# ADVERTISEMENT.

AFTER the very flattering manner in which the present publication has been announced by Mr. Cooper,* it would ill become the Reporter to do more than express his hope that the Profession may not find reason to complain, in this instance, of the partiality of friendship

It may be remarked that, in the arrangement of the following notes, the due order of time has not always been observed; an inaccuracy which, while the Reporter expresses his intention to avoid, as far as is consistent with other objects which he considers as of more importance, he requests the Reader, whenever it occurs, to attribute to the occasional difficulty of collecting and preparing, with sufficient accuracy, the materials for the report of each case immediately after its decision. The kindness of friends, which he is at all times happy to avail himself of, and proud to acknowledge, has also, in

* Advertisement to the Second Part of *Cooper's Cases in Chancery.*

several instances, supplied him with notes of cases which he had not himself the opportunity of hearing decided, at a period subsequent to that at which they should, in the regular order of time, have made their appearance. The ensuing Number will, accordingly, contain a few cases earlier in point of date than many of those now reported.

To the Chancery Bar at large, the Reporter has to express his sense of obligations similar to those conferred on his predecessor, the Preface to whose Volume of Cases (to which he hopes he may be permitted to refer for that purpose,) explains the nature of those obligations, together with the general motives and objects of the Work, in continuance of which the present was undertaken.

JOHN HERMAN MERIVALE.

*Lincoln's Inn, March* 14, 1816.

# TABLE

OF

# CASES REPORTED.

## VOL. I. PART I.

### A.



### B.



### D.

## M.



## N.



## P.



## R.



## S.

## T.



## U.



## W.

## MICHAELMAS, 1815.—TRINITY, 1816.

Lord ELDON, *Lord High Chancellor.*

Sir WILLIAM GRANT, *Master of the Rolls.*

Sir THOMAS PLUMER, *Vice-Chancellor.*

Sir WILLIAM GARROW, *Attorney-General.*

Sir SAMUEL SHEPHERD, *Solicitor-General.*

# TABLE

OF

# CASES REPORTED

## IN THIS VOLUME.

# REPORTS

OF

# CASES

ARGUED & DETERMINED

IN THE

# HIGH COURT OF CHANCERY,

Commencing in the Sittings before

*MICHAELMAS TERM,*

56 Geo. 3. 1815.



1815.

## DYER *v.* DYER.

*Oct.* 31. *Nov.* 1.

Motion of course, to file exceptions *nunc pro tunc*, within two terms, and the following vacation, from the date of the Master's Report of impertinence.

MOTION, as of course, by *Agar*, that Plaintiff may be at liberty to except to Defendant's answer.

The answer was filed in *Michaelmas* Term, 1814; referred for impertinence; and, being reported accordingly, by order made in the vacation after *Trinity* Term the impertinence was expunged and the costs taxed.

The Practice of the Court (*a*) allowing two Terms

(*a*) Vide *Thomas* v. *Llewellyn*, 6 Ves. 823. There can be no reference for insufficiency, pending a refer-

1815.
DYER v. DYER.

and the following vacation for filing exceptions *nunc pro tunc*, this application was made, upon the ground that, until the answer was reformed, it could not be judged whether sufficient or not; and therefore that, according to the reason of the rule, the time allowed ought to run from the latter period.

*The Lord* CHANCELLOR considered that it was necessary to make a precedent in this Case, which he should do upon the ground that, till the impertinence is expunged, it cannot be known what constitutes the answer. That the question raised by this application is, whether the date of the Master's Report ought not to be taken as the date of the answer; and for the reason already given his Lordship was of opinion that it should be so taken. That the motion should be of course, to save expence; and that the order to be framed should state the allegation made by the Counsel moving, so that it might be subsequently discharged if the allegation should prove untrue.

Ordered accordingly.

ence for impertinence. *Pellew v.* ——, 6 Ves. 456. And again, "There must be a judgment upon the reference for impertinence before there can be a judgment upon the reference for insufficiency." *Goodinge* v. *Woodhams*, 14 Ves. 534—536. See also, *Lacy* v. *Hornby*, 2 Ves. & B. 291—293.

1815.

## MILLS v. COBBY.

*Nov. 3.*

Delivery of declaration is a breach of the common injunction to stay proceedings at law(*a*). Effect of Plaintiff's acquiescence.

MOTION, on the part of the Plaintiff, that the Defendant might stand committed for breach of injunction to stay proceedings at law. The injunction issued on the 21st of *February*, and declaration in ejectment was served on the 19th of *May* following; to which the Plaintiff appeared and pleaded, and entered into the usual rule to confess lease, entry, and ouster. Notice of trial at the next Assizes was given on the 5th of *July*, and no objection made until the 19th three days before the commission, when the solicitor for the Defendant, being apprised by the Plaintiff's solicitor that the Defendant was in contempt, immediately countermanded his notice.

*Leach* and *Newland*, in support of the motion.

*Agar*, for the Defendant, contended, from the terms of the common injunction (*b*), that the delivery of declaration does not amount to a breach; and that if it did, still the acquiescence on the part of the Plaintiff amounted to a waiver of the contempt.

The Cases of *Sidney* v. *Hethrington* (*c*), and *Garlick* v. *Peirson* (*d*), were referred to.

(*a*) See *Bullen* v. *Ovey*, 16 Ves. 141. *Leonard* v. *Atwell*, 17 Ves. 385.

(*b*) See the same Argument disposed of in 16 Ves. 143.

(*c*) 3 P. W. 146. note b.

(*d*) 10 Ves. 450.

1815.

MILLS v. COBBY.

*The Lord* CHANCELLOR.

With regard to the effect of the common injunction, it is clearly settled, and not now to be questioned on the ground of any apparent inconsistency in the form, that, in the case where proceedings at law are not yet commenced, it goes to prevent the delivery of the declaration.

This, however, is not the case of a wilful violation of the orders of the Court; and although, in such a case, no act of the parties could amount to a waiver of the contempt incurred; yet, in the present, it must be considered, that the Plaintiff has by his acquiescence dispensed with the ordinary process.

No Costs on either side; and the Plaintiff took nothing by his Motion.

---

*Nov.* 3.

## BRICKWOOD *v.* MILLER.

Order, that Defendant might be at liberty to rejoin *de novo*, giving notice of his intention to dispute the Bankruptcy; allowed to be retained only on his consenting to admit as evidence, the depositions of a deceased witness, as being necessary to prove the Act of Bankruptcy.

BILL, by assignees of a Bankrupt, charged an Act of Bankruptcy and Commission issued on 29th *January*, 1805, before the statute 49 *Geo.* 3. c. 121.

The answer, filed after the statute, not admitting

the Act of Bankruptcy, referred the Plaintiff to such proof as he might be able to make.

On the 11th of *July*, an Order (*a*) was obtained by the Defendant, upon undertaking to pay all such costs as the Court should upon future application direct, that he might be at liberty to withdraw his rejoinder, and to rejoin *de novo* forthwith, and to give notice of his intention to dispute the Act of Bankruptcy and the petitioning Creditor's Debt, according to the statute.

The Plaintiff now moved to discharge that order, upon affidavit that the person who proved the Act of Bankruptcy had, since the order was made, been discovered to have died several years ago, at *Gibraltar*; and that, as the Deponent was informed and believed, there was now no person living who could prove the Act of Bankruptcy on the proceedings, or any Act of Bankruptcy committed by the Bankrupt.

Sir *Samuel Romilly* in support of the motion.

*Lovat*, for the Defendant, referred to the Cases of *Berks* v. *Wigan* (*b*), *Radmore* v. *Gould* (*c*), and *Willock* v. *Smith* (*d*).

*Nov.* 6.

On the first day of Term, the *Lord Chancellor*, after consulting with the *Lord Chief Baron* and others of the Judges, expressed their unanimous opinion, in conformity with his own, that the liberty given by the order, being a mere act of indulgence,

(*a*) 2 Rose, 216. Cooper, 270.

(*b*) 1 Ves & B. 221.

(*c*) 1 Wightw. 30. 1 Rose 122.

(*d*) 2 Campb. 184.

1815.

BRICKWOOD v. MILLER.

ought not to be extended to a case where the negligence of the party obtaining it has put it out of the power of the other party to establish the fact which it is intended to dispute.

The order was therefore directed to stand only upon the terms of the Defendant consenting that the depositions of the person deceased, which were made in the bankruptcy, should be admitted as evidence of the act of bankruptcy.(*a*)

(*a*) That the statute 49 Geo. 3. does not render the proceedings on a commission conclusive evidence of the act of bankruptcy, see *Ellis* v. *Shirley*, 3 Campb. 424. So the case of *Jones* v. *Llewellyn*, in the Exchequer, *Jan.* 14th, 1815, of which I have been favoured with the following note:

"Bill by assignees of a bankrupt to impeach a release by the bankrupt of the equity of redemption of mortgaged property, and to be let in to redeem the mortgage. The defendant denied that any act of bankruptcy had been committed, and put the Plaintiffs to the proof thereof; but did not give the Plaintiffs the notice required by the statute."

*Martin*, for the Plaintiffs, produced the commission and proceedings as conclusive evidence of the act of bankruptcy, and contended that the court could not look into the proceedings to see whether any act of bankruptcy had in fact been committed, but that they were bound by the finding of the commissioners.

*Dauncey* and *Simpkinson*, *contrà*, contended that the act never could mean to make this conclusive evidence; that it only made it evidence in certain cases to avoid expence; but that, so far from the evidence being conclusive, the act said merely that it "shall be evidence to be received by the Court;" but that it was subject to be controverted like any other evidence; and cited *Ellis* v. *Shirley*.

*And of this opinion was the Court.*

1815.

## *Ex Parte* HOOPER and Others, in the Matter of HEWETT and HOPKINS, Bankers.

*Nov.* 8.

Mortgage, held no security for subsequent advances made on the strength of a parol engagement.

ASSIGNMENT, by the Bankrupts, of Leasehold Premises, by way of Mortgage, for securing the sum of £400 and interest.

The Bankrupts subsequently becoming indebted to the Mortgagee in further sums received by them for his use, an account was stated and settled between the Parties, on which a balance of £400 was ascertained, and the following memorandum delivered.

"Hewett and Hopkins, debtors to Mr. J. Ford £400, on balance of account due the 12th day of *June*, 1813."

The bankrupts farther entered into a parol engagement that the last mentioned £400 should be tacked to the original mortgage; and that, as soon as a new lease of the premises could be obtained, a mortgage security for the same should be executed by the bankrupts; but which, owing to the renewal not having been obtained, was never done.

Interest was paid on both sums to the 12th of June, 1814; and on the 8th of December following the commission issued.

The proceedings were then looked into; and, it appearing clearly that no act of bankruptcy had been committed, the bill was dismissed with costs."

1815.

*Ex parte* HOOPER in the Matter of HEWETT.

The petition prayed a sale of the mortgaged premises, and that, after applying £800 in liquidation of the debt, the residue might be proved; with the usual directions.

The single point before the Court was, whether or not the petitioners were entitled to tack the second £400 debt to their mortgage security.

The petition came on to be heard before the long vacation, when the Chancellor having expressed himself adverse to the prayer, it was requested that it might stand over, and was this day re-argued.

*Fonblanque*, in support of the petition, compared this to the cases of part performance of agreement to purchase; and, contending that the advance of the £400, in this instance, was such an act of part performance by the testator, referred to *Clinan* v. *Cooke* (*a*) before Lord *Redesdale*, and the case cited in note p. 40 to the report of that case, for the rule that, where the whole sum contracted for is paid, that is such a part performance by the vendee as to take the case out of the statute; but not, where only a part. That, in the case of an equitable mortgage, the deposit operates as a lien by reason of the implied agreement.

*Montagu*, on the same side, referred to the case *Ex parte Langston* (*b*) as deciding the present, on the ground that an equitable mortgage by deposit of title-deeds must be held to cover subsequent advances, on evidence that they were made upon that security. If the deed had been delivered up, and returned at the time of making the subsequent advance, this would have been clearly an equitable mortgage.

(*a*) 1 Scho. & Lef. 22. (*b*) 17 Ves. 227. 1 Rose, 26.

*Ex parte* HOOPER in the Matter of HEWETT.

*Hart*, for the assignees.

*The Lord* CHANCELLOR.

There is an evident distinction between the cases of loan and purchase; and, without expressing any opinion on the question, whether, in the former case, payment of the whole, or of part, of the purchase money, is, or is not, a part performance to take it out of the Statute, it is enough to say that the advance of money upon a contract for loan affords, of necessity, no evidence of any intention but that of creating the relation of debtor and creditor.

The doctrine of equitable mortgage by deposit of title-deeds has been too long established (*a*) to be now disputed; but it may be said that it ought never to have been established.(*b*) I am still more dissatisfied with the principle, upon which I have acted,(*c*) of extending the original doctrine so as to make the deposit a security for subsequent advances. At all events, that doctrine is not to be further enlarged. In the present case, the legal estate has been assigned by way of mortgage. The mortgagee is not entitled to say, I hold this conveyance as a deposit; because the contract under which he holds it is a contract for conveyance only, and not for deposit. The subsequent memorandum in writing creates nothing more than a debt by simple contract, and cannot be added to by parol.

The cases on this subject have gone too far al-

(*a*) Vide *Russel* v. *Russel*, 1 Bro. 269. and cases there collected.

(*b*) So, in *Ex parte Coombe*, 17 Ves. 371., and *Ex parte Whitbread*, 1 Rose, 299.

(*c*) In *Ex parte Langston*, and other cases.

1815.

*Ex parte* HOOPER in the Matter of HEWETT.

ready; and I would be understood as saying that I will not add to their authority, wherever the circumstances are such as to warrant me in making a distinction

The petition dismissed with liberty to file a bill.

*Nov.* 8, 9.

## *Ex parte* WHITEHEAD, in the Matter of ALSTON.

The price stipulated for the redemption of an annuity affords no criterion of the value to be proved under a commission of bankruptcy. *Query*, as to any general rule according to which that value is to be estimated.

BY indenture dated the 19th of *November*, 1808, the bankrupt, in consideration of £2506, granted to the petitioner an annuity of £358, during the lives of three persons therein named, and the life of the survivor, subject to redemption on payment of £2685, being the original price, with a half year in advance. The annuity was secured by surrender of copyhold, and assignment of leasehold premises.

On the 2nd of *August*, 1814, a commission issued, and the petitioner thereupon caused the annuity to be valued by the actuary of the Equitable Insurance Office, who computed the same to be worth in money at the time of the bankruptcy, according to the rates at which a like annuity might have been purchased from the commissioners for redemption of the national debt under the several Acts of the 48th, 49th, and 52nd, of the King, (regard being had to the lives in being, their state of health, and the then price of £3 per cent. consols,) the sum of £6104, which sum the petitioner claimed to be entitled to prove accordingly; the com-

missioners having refused to admit his proofs for a greater sum than the £2685, the stipulated price of redemption.

By statute 49 *Geo.* 3. *c.* 121. *s.* 17. it is enacted "that it shall be competent to any annuity creditor of any person against whom a commission of bankruptcy shall issue, to prove under such commission, as a creditor, for the value of such annuity; which value the commissioners shall have power, and are hereby required, to ascertain."

Sir *Samuel Romilly* and *Hart*, for the petition, relied on the decision of the *Lord Chancellor* in *Ex parte Thistlewood*.(*a*)

*Leach*, *Bell*, and *Montagu*, for the assignees.

The actual value of an annuity, calculated by the tables, can never be the true principle of valuation in these cases. Does any man lay out money in the purchase of property of so objectionable a description in the expectation of mere ordinary profit? If not, what right has he to demand a price which he would never have given? In purchasing an annuity, no man looks at the average value of human lives, but at the individual life or lives for which he purchases. The value of an annuity likewise depends most materially on the regularity and certainty of the stipulated payments. It is impossible that the Court can, in every case, so shape an enquiry as to meet all these contingencies. It must, therefore, of necessity, adopt some general rule; and what more rational than that the price contracted for on both sides is the best evidence

(*a*) 1 Rose, 290.

1815.

*Ex parte* WHITEHEAD in the Matter of ALSTON.

of the actual value at the time of the purchase, being that which was agreed upon by those best acquainted with the circumstances, and who must in all cases be presumed to have acted fairly in the transaction; from which, however, is to be deducted the estimated value of the time of enjoyment, the annuity being evidently worth so much less than it was originally, in consequence of the diminished value of the life on which it was granted (*a*). In this case the commissioners were mistaken in adopting the redemption price as the criterion of their judgment; that being merely conventional, and determining the maximum indeed, beyond which the proof should not be admitted, but by no means the actual value. In the purchase of government annuities, which are liable to no contingencies, and payable up to a certain given period, the actuary proceeds upon fixed principles of calculation, which are by no means applicable to this sort of transaction; and accordingly it happens, every day, that the market price of an annuity is, out of all proportion, below the value at which the actuary's calculation would fix it. The case of *Ex parte Thistlewood* (*b*) does not decide the present, the *Chancellor's* judgment in that case being expressly grounded on the particular circumstances, one of which, and that a most material circumstance, was the infirm state of health of the grantor at the time of the contract, and his subsequent convalescence.

Sir *Samuel Romilly* in reply.

This is an extremely important case; the more so if it is not to be considered as governed by that of *Ex parte Thistlewood*, in which, however, there is no

(*a*) *Ex parte Le Compte*, 1 Atk. 251.

(*b*) 1 Rose, 290.

1815.

*Ex parte* WHITEHEAD in the Matter of ALSTON.

doubt of the *Lord Chancellor's* words, nor of the sense, as generally applicable, that the value of the annuity must be taken at the time of the proof made before the commissioners. The redemption price is certainly no criterion of the value; and the decision of the commissioners, therefore, cannot be right. Yet it is no less certain that some general rule must be laid down as the criterion; and this I understand to have been already done in the case so often referred to. If the value at the time of the proof made is that which ought to be proved, then the original price given for the annuity affords no evidence whatever of that value. The value of money may have materially altered, the price of stocks risen or fallen, since the time of the contract entered into. These, and a thousand other circumstances, besides the mere time of enjoyment must be taken into the calculation, and this supposed rule of evidence be rendered, to the last degree, fluctuating and uncertain. The present case does not come under the Act of Parliament, on account of the forfeiture before bankruptcy: the proof may therefore have been made independently of the Act; and it is not necessary to resort to it for the criterion. With respect to the argument, that the purchaser of an annuity takes it at less than its actual value on calculation, that is true; for he takes it with reference to the risks attendant on such a transaction, the value of the securities, the chance of insolvency, and the uncertainty of payments; but he is not therefore to be deprived of the benefit of contingencies; nor, because the contract might have turned out to his disadvantage, be prevented from using the fair advantages of his actual situation. If fraud be imputed, that is a ground for applying to the Courts, that the proof may be confined to the amount of the original purchase-money. But this is a species of transaction recognised

1815.

*Ex parte* WHITEHEAD in the Matter of ALSTON.

by the Courts and by the Legislature, to which, at this time of day, no blame or stigma is attached, in many instances, on the contrary, having a beneficial tendency, and being by no means the object of judicial jealousy or disapprobation.

*The Lord* CHANCELLOR.

This is a case in which it is very material to settle the practice of the Court; but there is danger, lest, instead of settling, it may disturb it. The case of *Ex parte Thistlewood* was decided on circumstances which do not here apply. The circumstances are detailed in the Master's report on that case; and they are of so peculiar a nature as to render the case of no authority in deciding the general principle either way. How to fix that principle is a matter of great doubt and difficulty. I have caused enquiries to be made in all the Masters' offices, and of several Commissioners; and the result has been that the greatest uncertainty prevails in respect to the practice; the answers to some of these enquiries being, that the amount of the original contract with deduction for the time of enjoyment, to others that the value at the time of the death or of the bankruptcy, is the principle of valuation. If the principle be, what the annuity is worth in the estimation of the contracting parties, the price contracted for affords no certain rule; for their relative estimation of the value may have varied since. Notwithstanding this, it seems that the contract should be admitted, as furnishing a strong, though not the sole, ground of evidence in judging of the value. The statute has nothing to do with this case; before that statute, the rule was, that the proof should be made according to value; and the statute itself gives no rule for determining the value, but meant to leave it to the Com-

1815.

*Ex parte* WHITEHEAD in the Matter of ALSTON.

missioners to determine. This rule must not depend on the validity of the security, but must proceed, in all cases, as on an annuity well secured. The loose unsettled state of the practice makes it highly necessary that a rule should be laid down once for all; but, at present, I shall decide nothing further than that the rule adopted by the Commissioners in this case is wrong; for the redemption price affords no evidence of value whatever; it is not fixed upon any calculation of value; and its amount is always the same, depending upon none of those variations in respect of circumstances which must govern, in case the actual value, upon calculation, is not the criterion.

## LIEBENROOD *v.* VINES.

*Nov.* 9.

Tenant, under agreement to manage and quit the premises agreeably to the manner in which the same had been managed and quitted by the former tenants, not bound by the terms upon which they held, without notice. No enquiry as to the custom of the country, where there is a written agreement.

IN the year 1800, the Plaintiff purchased the fee-simple and inheritance of two farms, then in the respective occupations of *Ilsley* and *Barratt*; and, by articles of agreement, dated the 24th of *March*, 1802, he agreed to demise to the Defendant both the said farms, for a term of eleven years, with a condition, that in the lease to be granted should be contained, as to the said farms, "covenants clauses and agreements for sowing and managing thereof and for disposing of the dung and straw and quitting and yielding up the premises agreeably to the manner in which the same had been and should be respectively sown

1815.

LIEBENROOD
v.
VINES.

managed and quitted by the then present tenants thereof."

*Ilsley* and *Barratt* having quitted, the Defendant was soon after admitted into possession of, and continued to occupy, the premises, upon the terms of the agreement, until the 20th of *March* last, when the Plaintiff gave him notice to quit.

The Bill, praying an injunction, stated a prior lease of the premises to *Barratt*'s father, for a term of fourteen years, made in the year 1762, in which lease was contained a covenant on the part of the lessee as to the management and quitting of the farm; charging that though the said lease was long since expired, yet *Ilsley* and *Barratt*, who succeeded the lessee in respective parts of the demised premises, managed and quitted the same upon the footing of the covenant therein contained, as the Defendant himself well knew, or was sufficiently informed; notwithstanding which, he had acted in a manner directly contrary to the terms of the covenant, having, since he received the said notice to quit, sold or taken off or removed from the premises, a considerable part of the crops, &c. which ought to have been left thereon, and threatening to remove other parts of the same.

The Defendant, by his answer, denying notice of the lease of 1762, alleged that *Barratt* and *Ilsley* did not hold upon the footing thereof, "for that" they both, before they quitted, removed the whole or a considerable part of the crops, &c. then upon the premises, and that the Defendant himself actually purchased other parts thereof upon his entering into possession.

1815.

LIEBENROOD v. VINES.

He now moved to dissolve the injunction which had been obtained for want of answer.

Sir *Samuel Romilly* and *Parker* in support of the motion.

*Leach* and *Wilson*, for the Plaintiff.

The question is, what the Defendant could himself legally do; not what the tenants whom he succeeded did. Upon the agreement, the intention is manifest that the lease should contain certain covenants relative to the managing and quitting the premises, such as could be legally acted upon, and by which the then tenants were conceived to be bound. The Defendant denies notice of the lease of 1762, and does not believe that the tenants held under the covenants of that lease. Why?—because they acted in a manner contrary to those covenants. But he neither denies the lease itself; nor can he deny, except in that vague manner as to his belief, that although the lease had expired in 1783, yet the tenants were bound by the covenants it contained. There was enough in the articles of agreement, (which were executed half a year previous to Defendant's taking possession,) to put him on his enquiry respecting the terms under which they held, and by which he was himself to be bound; in the same manner as the purchaser of an estate, knowing it to be in the possession of tenants, is bound to enquire into the interests those tenants have. *Taylor* v. *Stibbert* (*a*).

Another ground laid by the Plaintiff was, that the

(*a*) 2 Ves. jun. 437. vide *Davison*, 16 Ves. 249. p. 410. See also *Daniels* v.

1815.
LIEBENROOD
v.
VINES.

conduct of this Defendant was contrary to the custom of the country; and this was not met by the Defendant any otherwise than by saying, that he believes it is not contrary to the custom.

*The Lord* CHANCELLOR.

Putting this case in the strongest way possible for the Plaintiff, as, that there was a lease, which having expired, the tenants held on under the terms of that lease; still, the agreement with the Defendant is, in direct terms, not that he shall hold as those tenants held, but that he shall manage the estate according to the mode, and quit it in the condition, in which they shall have managed and quitted it respectively; that is, as the landlord himself shall have permitted them to manage and quit. The conduct of the landlord, in this instance, affords the best explanation of whatever was left doubtful and indefinite in the agreement. The incoming tenant, who finds all the articles which are the subject of this injunction removed previously to his taking possession, has a right to consider that removal as the act of the landlord; and, even if it was the meaning of the agreement that the covenants of the lease of 1762 should govern the new tenancy, the landlord, in suffering such removal, is himself the first to violate the agreement, and therefore not to complain of its subsequent infringement by his tenant. But the agreement contains no such condition, and I have no right to interpose terms which I do not find to exist. The material point is to look at the condition of the estate, and the mode in which it was managed, at the time of the Defendant's taking possession; since that is the only rule by which, according to the agreement, he was to be guided.

1815.

LIEBENROOD v. VINES.

With regard to the question, what is the custom of the country, that is one which has no place where there is a written agreement.

The injunction dissolved.

## LOWE *v.* MANNERS.

*Nov.* 14.

Reference of title before decree refused, where the purchaser, besides objecting to the title, claimed compensation for defect of quantity; even though he submitted to complete his agreement.

BILL by vendor for a specific performance. The Defendant (the purchaser) admitted the agreement and delivery of abstract; but he said that he was advised there was a bad title, and that there was a deficiency in quantity of nine acres out of 183; alleging, however, that he was ready and willing to complete his agreement, on having a good title and compensation for the deficiency.

*Shadwell*, for the Plaintiff, moved for a reference of the title.

*Hazlewood* opposed the motion, on the ground that there was something else in dispute than the title merely (*a*).

*Shadwell*, in reply, relied on the offer in the answer to complete the purchase.

The LORD CHANCELLOR refused the motion; but without costs(*b*).

(*a*) Vide *Blyth* v. *Elmhirst*, 1 Ves. & B. 1. *Balmanno* v. *Lumly*, ibid. 224. *Paton* v. *Rogers*, ibid. 351.

(*b*) *Ex relatione.*

1815.

Rolls.
*Nov.* 21.
*Dec.* 18.

## DONN *v.* PENNY.

Testator gives all his real and personal estates "to A. and his male issue and for want of male issue after him to B. and his male issue." These words give to A. the absolute interest in the personal estate.

THIS case arose on the construction of the following will:—

"I give my dearly beloved wife all my real and personal estates for her life and after her I give the same to my cousin *Robert Donn* of *Exon* all my real and personal estates to him and his male issue. For want of male issue after him I give the same to my cousin, *William Donn* of *Odcombe* and his male issue. For his want of male issue I give the same to *William* and *Samuel Kitson* and their male issue."

The question, respecting the personal estate only, was, whether the above words gave the absolute interest to *Robert*, after the death of the widow; or a life interest only, with an executory devise to the plaintiff, *William*, on the event of *Robert*'s death without leaving male issue; which event had happened.

Sir *Samuel Romilly*, *Hart*, and *Mascall*, for the Plaintiff, *William Donn*.

*Leach*, and *Trollope*, for the Defendants, the executors of *Robert Donn*.

On the part of the former, it was contended that, although the devise to *Robert Donn*, as applied to the real estate, clearly constituted an estate tail; and although the same words, if standing alone, must therefore have given him the absolute interest in the personal; yet the words immediately following, "for

want of male issue after him," would (regard being had to the inclination of Courts of Justice to restrain a dying without issue, in the case of personal estate, to a dying without issue living at the death of the first taker, so as to give effect to the devises over,) be considered, either as equivalent to the words "without male issue surviving him"(*a*), or else, as if the testator had said, "and for want of male issue of *Robert*, then after his decease," meaning "immediately after his decease," which would bring the case within that of *Pinbury* v. *Elkin*,(*b*) and that, by either of these constructions, the devise over to *William* would, as to the personal estate, operate as an executory devise.

MASTER OF THE ROLLS.

There is no doubt that the words constituting the devise to *Robert Donn* would, of themselves, be sufficient to give him the absolute interest in the personal estate: but it is contended that they are qualified by the words immediately following; and it is said that those last mentioned words imply "for want of male issue living at my death."

In the case of *Barlow* v. *Salter*(*c*), I gave my opinion as to the rule of construction which ought to govern cases of this description; and the rule which is there laid down is not to be departed from, unless it be made satisfactorily to appear, from some expression in, or circumstances connected with, the will, that the testator's intention was otherwise.

(*a*) *Forth* v. *Chapman*, 1 P. Wms. 663. *Porter* v. *Bradley*, 3 T. R. 143.

(*b*) 1 P. Wms. 563.

(*c*) 17 Ves. 479.

1815.

DONN
*v.*
PENNY.

The words of Lord *Thurlow*, in *Bigge* v. *Bensley*(*a*), seem to be inaccurately reported; since in one place he is made to say "that the general sense of dying without issue, is at the time of the death;" when in another he says, as the result of the case shews to have been his opinion, that "to call dying *without leaving* issue, the natural sense of dying *without* issue, is against all the cases." In the present case there is a farther step to be taken; for it is necessary, in order to support the plaintiff's construction, to shew, first, that the words "after him" mean "after his decease," and, secondly, that these last words mean "at his decease."

In the case of *Pinbury* v. *Elkin*, supposing the construction there given to be right, there was a determinate period assigned, namely, the death of the first taker. Here, his death is not mentioned; and it is farther to be observed that to construe "after," "at," would, in this case, make absolute nonsense of the passage, the words "his decease" not being previously introduced into it.

The words are in themselves ambiguous; and, in my opinion, no definite idea whatever attached itself to them in the mind of the testator. He meant to give his real and personal estate together, first, to *Robert* and his male issue; then, to *William* and his male issue; lastly, to the *Kitsons* and their male issue. The words of limitation "after him" precede the devise to *William* only, and not that to the *Kitsons*; yet there is not the smallest indication of an intention to give to *William* differently from them. If *Robert* had died in the life of the testator, there is no question

(*a*) 1 Bro. 187.

1815.

DONN v. PENNY.

but *William* would have taken the absolute interest. Yet there is no ground to imagine that a distinction in his favour was meant to be made between him and *Robert*. On the contrary, *Robert* precedes *William* as an object of the testator's bounty; and thus the effect of the plaintiff's construction would be to give the most limited interest to the most favoured person. Where, then, is the fair demonstration which Lord *Thurlow* speaks of (*a*), as alone to vary the general sense of the words in question?

The bill was dismissed, but without costs.

(*a*) 1 Bro. 190.

ROLLS.

Dec. 12 & 13.

## HENWOOD v. OVEREND.

Gift of residue "to be divided among legatees in proportion to the legacies bequeathed by this my will;" restricted, upon construction of the whole will, to general pecuniary legatees, in exclusion of legacies payable out of a specific fund *in futuro*, and of legacies given by codicil.

THE testator, in this case, by his will, gave devised and bequeathed to trustees (whom he also named his executors,) their heirs, &c. all his real and personal estate upon trust to sell and out of the monies arising therefrom, in the first place, to pay his debts and funeral expences, &c. in the next place, to lay out and invest the sum of £6000 for the purpose of raising an annuity payable to the testator's wife as therein mentioned; "and then upon this further trust that they my said trustees or the survivors, &c. shall and do pay the following legacies or sums of money

1815.

Henwood v. Overend.

twelve calendar months next after my decease that is to say," &c.

Then, after giving certain legacies to his said trustees and executors, and legacies for charitable purposes and also several other pecuniary legacies to a considerable amount, the will proceeded as follows:

"And as to for and concerning all the rest residue and remainder of the monies to arise by the sale of my said real and personal estates upon this further trust that my said trustees or the survivors," &c. "shall and do pay apply and divide the same unto and amongst the several legatees in proportion to the several sums of money bequeathed to them by this my will and to their respective executors administrators and assigns for ever (except my said trustees and executors of this my will, and the several sums of money bequeathed by me as herein mentioned for charitable purposes.)"

The will then went on to direct that, from and immediately after the death of the testator's wife, the trustees, &c. should apply the said sum of £6000 in payment of the several legacies therein after specified, and among others the interest of two several sums of £500 to the two persons therein named for their lives, the principal to be divided amongst their respective children after the decease of each.

The whole of the last mentioned legacies were not of sufficient amount to exhaust the £6000; and it was further directed that such surplus (if any) should be considered as part of the residue.

By a codicil specified "to be added to and taken as part of" his said last will and testament the testator gave other legacies also to a considerable amount.

The questions in this case arose between the several classes of legatees named in the will and codicil, and were shortly these:

Whether the legatees named in the will *before* the clause bequeathing the residue were exclusively entitled to the residue?

Whether all the legatees named in the will were to be considered as entitled, in exclusion of the legatees under the codicil?

And, lastly, whether the legatees under the codicil were also to be admitted?

Sir *Samuel Romilly* and *Benyon*, for the prior legatees in the will.

*Leach* and *Trower*, for the legatees whose legacies were payable out of the £6000.

*Fonblanque*, *Collinson*, and *Gardiner*, for different legatees named in the codicil.

*The* MASTER *of the* ROLLS

Thought that, on the whole construction of this will, the distribution of the residue must be confined to that class of legatees, under the will, whose legacies are payable immediately; the £6000 not being itself a legacy, but a fund set apart for a particular purpose, and divisible, after that purpose should have ceased, in such a manner as not certainly to exhaust it, with limitations over as to some of the sums payable out of it.

1815.

HENWOOD v. OVEREND.

Then, with regard to the codicil, which, it had been contended, must be taken, together with the will, as forming one entire instrument, his Honour was of opinion that the case of *Bonner* v. *Bonner*,(*a*) constituted an authority to govern this; and that the words "hereby" and "hereinafter" in that case were not less strong than the restrictive phrase "by this my will" in the present.

On these grounds, his Honour decided that the legatees under the codicil were excluded; and that none were entitled to share in the residue, except the general pecuniary legatees named in the will.

(*a*) 13 Ves. 379.

*Dec.* 8.

## STEWART *v.* ALLISTON.

Injunction to stay proceedings in an action brought by a purchaser to recover the amount of his deposit refused; the description in the printed particular of sale being calculated grossly to deceive as to the real nature and value of the estate sold. Construction of the word "ground-rent" as to the general acceptation. No compensation in a case of great intentional misrepresentation, although so provided by the conditions of sale in case of "any error or mis-statement" in the particulars.

ON the 17th of *November*, 1814, certain freehold and copyhold estates belonging to the plaintiff were put up to sale by public auction, when the defendant signed an agreement to become purchaser of a part of those premises, and paid the deposit, agreeably to the conditions of sale. The premises so purchased by him were described in the printed par-

ticulars as "a copyhold estate consisting of seven dwelling-houses with gardens, on a ground rent lease at 40 guineas a year;" and, in another part of the same particulars, as "an eligible copyhold estate comprising seven dwelling-houses with gardens and right of common let on lease for a term whereof fourteen years were unexpired, at a nett annual ground rent of £42, held under the manor of *Westham*, subject to a small annual quit rent and to a customary fine on death or alienation."

By the conditions of sale the purchaser was to be entitled to the rents and profits from Christmas 1814; and it was declared that "if any error or mis-statement should be inserted in the particulars, the same should not vitiate the sale; but a proportionable allowance was to be made as a compensation either way."

The bill, stating that, immediately after the sale, an abstract was delivered to the Defendant whereby a good title had been made, prayed a specific performance, with compensation in case of error in the description affecting the value, and an injunction to restrain the Defendant from proceeding in an action which he had commenced to recover the amount of the deposit.

To this bill the Defendant put in an answer, admitting the Plaintiff's title to the premises, but alleging that, at the time of making the purchase, the Defendant had never seen the premises, but relied altogether on the accuracy of the printed particulars and estimated the value of the premises upon the supposition that the said sum of £42 was payable by way of ground rent and not of rack rent and that he would be entitled not only to such ground rent during the remainder of the term but, at the expiration thereof,

1815.

STEWART v. ALLISTON.

to the annual value of the tenements since erected which (he supposed) would greatly exceed the amount of such ground rent; but that, on the contrary, he had since discovered, and the fact was, that no ground rent whatever was reserved on the premises, and that the sum of £42 was the full and utmost annual rack rent both of the ground and buildings thereon, reserved by a lease made long since the buildings were erected, in the ordinary way of demise, and much more than the actual value thereof, the buildings being very mean, and much out of repair, &c.

The Plaintiff afterwards amended his bill, stating that the particulars of the rent reserved appeared upon the abstract, which, having been delivered, as above stated, was laid by the Defendant before Counsel, who, in an opinion upon the title, pointed out certain enquiries to be made, subject to which he approved thereof; that those enquiries were satisfactorily answered upon the 7th of *December*, and the Defendant remained satisfied therewith till the month of *March* following when he first made the objection alleged by his answer, that the rent reserved was not a ground rent; therefore praying in addition, that the Defendant might be declared to have waived all right of objecting.

To this the Defendant answered, that the attention of the Counsel, when he gave his opinion on the abstract, had not been drawn to the variation in the nature of the rent from that stated in the particular; denying that he was satisfied with the answers given to the enquiries then suggested; and accounting for the delay in making his present objection by a correspondence which was afterwards entered into relative to certain of those enquiries, and also from the circumstance that he, the Defendant, was employed as Solicitor for the purchaser

1815.

STEWART v. ALLISTON.

of other parts of the premises sold at the said auction, which purchase could not be sooner completed, and that he deferred arranging his own business till both could be settled together. He added, that the objection which he at last made was founded on a second opinion given by the same Counsel, that, the rent not being a ground rent, the purchaser could not be compelled to complete his contract.

*Cooke*, for the Plaintiff, now moved for an injunction.

The question is, first, as to the construction of the word "ground-rent" in the printed particular; secondly, whether the purchaser, being made fully aware of the nature of the rent in question by the delivery of the abstract, has not, by his subsequent conduct, precluded himself from taking this objection to the completion of his contract.

There is no invariable technical construction of the word in question, which is equally applicable to land already built upon and to land let for the purpose of building. Its meaning must be determined by the context; and, in the present case, the context makes it clear that it could not be intended in the sense which the Defendant assigns to it, the premises being described as consisting of "seven dwelling-houses" already built, "with gardens and right of common."

The word has, indeed, received a judicial construction different from that now insisted upon to be its exclusive meaning in the case of *Maundy* v. *Maundy* (*a*), where the Court of King's Bench declared, that "nothing is more common than for people to

(*a*) 2 Stra. 1020.

1815.
STEWART
v.
ALLISTON.

speak of their ground-rents, when they mean the houses and lands out of which they issue," and decided according to that interpretation.

Sir *Samuel Romilly* and *Stephen*, for the Defendant.

The single question in this case is, as to the description in the particulars of sale; and that is a pure legal question to be decided on trial of the action brought for recovery of the deposit.

If it should be thought necessary at all to go into the question in this place, it is manifest that the Defendant has been grossly deceived and that the particular was expressly calculated for the purpose of so deceiving him. The case cited from *Strange* has no application to the present. That was where land was already let out at a ground-rent and the reversioner devised a certain portion of that ground-rent, and the Court was of opinion that he intended to devise the land out of which it issued.

It is not necessary to shew that the word was used for the purpose of deception, it being enough that it was calculated to deceive. The only popular acceptation of the word "ground-rent" is that of a rent reserved upon land subsequently converted to some valuable present use, such as building. This is like the cases of misrepresentation as to the amount of rent, on which it has been long since decided that an action would lie. *Lysney* v. *Selby* (a), and *Eakins* v. *Tresham* (b). It would be a strange inconsistency if a purchaser could maintain an action at law and the vendor had his remedy in equity on one and the same contract; and, accordingly,

(a) 2 Ld. Raym. 1118. (b) 1 Lev. 102.

the case of *Shirley* v. *Stratton* (*a*) shews that this cannot be where there has been an industrious concealment on the part of the latter. This is no case for compensation, which lies only for defect of value, not where the variation is of the actual substance of the thing contracted for.

*Cooke* in reply.

This is a proper case for the decision of a Court of Equity. By an action nothing can be tried but the bare construction of the word. Here there are many other circumstances of great importance to be taken into consideration; as, first, the price given, amounting only to ten years' purchase; then the amount of the rent reserved, with reference to the quantity of land, the premises being situated not in London but in the country; both which tend strongly to shew that the Defendant could not but be aware of the nature of the property which he contracted to purchase.

The case in *Strange* was not cited with a view of guiding the particular construction of the word in the present case, but only for the purpose of shewing that, in all cases, the Court will regulate the meaning of a word, in itself ambiguous, by reference to the context.

The question of compensation does not yet arise, that before the Court being, not whether there shall be a specific performance, but whether the action at law shall, or shall not, be suffered to proceed. With reference to this question, the time that has been suffered to elapse is very material; and a party shall not

(*a*) 1 Bro. 440, *et vide Grant* v. *Munt*, Coop. 173.

1815.

STEWART v. ALLISTON.

be allowed, after proceeding so far, to go back to an objection which might have been made at first, especially as that party is himself a solicitor and therefore must be taken to be aware of what he was about. *Smith* v. *Burnam* (a), *Pincke* v. *Curteis*(b).

*The* LORD CHANCELLOR.

In this case, the question of construction is a pure legal question. It is true that, in many instances, the Court has interfered by injunction after bill filed, and has even decreed a specific performance, where the action at law might otherwise have been maintained. Lord *Thurlow* used to say, that the jurisdiction of a Court of Equity to compel a specific performance must have been founded upon the notion of its being against conscience to take advantage of small circumstances of variation in the description of the thing contracted for; and that the principle, being once established, was gradually enlarged till a specific performance in equity became at length a performance of any thing rather than the real contract between the parties. Such are the cases of the house and wharf before Sir *Thomas Sewell*; of the estate purchased as an estate in *Essex* which turned out to be in *Kent*; and the case of Lord *Stanhope*, whose object was to get an estate tithe free, and who was made to take the estate subject to tithe with a compensation (c).

There is no instance, however, in which the Court has enjoined, where it appears upon the face of it that

(a) 2 Anstr. 527.

(b) 4 Bro. 329.

(c) All these cases are cited by the Chancellor in *Drewe* v. *Hanson*, 6 Ves. 678.

the action commenced must effect the object of obtaining the judgment of a court of law on the whole case. In the present case, the question being the real meaning of the phrase used in the description of the estate sold, the Court will say that, if the question can be clearly and solely raised by the action at law, that action ought to be suffered to proceed. I am of opinion that this is the single question; for, on the other points attempted to be raised, I do not think it necessary, because the opinion of a Conveyancer has been had, to force the party to take a subject essentially different from that which he has contracted to purchase, and on which alone that opinion was called for. Neither do I agree with the principle contended for, that there is a head of equity for solicitors different from that which is applicable to other individuals. Here it is, what was the subject represented to be at the time the contract was made; not what did it turn out to be at any subsequent period when it came to be looked into. Upon this question the principle of construction must be the same at law and in equity; and, unless pressed for my opinion respecting it, I am bound to do nothing further at present than to refuse the injunction.

The parties having expressed a wish to have the question disposed of, his Lordship proceeded to state his opinion accordingly.

I think that the property which is the subject of this application has been represented to be that which it is not in fact; and, even if a Court of Law should judge otherwise, I should have great difficulty in decreeing a specific performance where the description is, at the

1815.
STEWART
v.
ALLISTON.

least, of so ambiguous a nature that it cannot with certainty be known what it was that the purchaser imagined himself to be contracting for. But what, in fact, does the word mean which is here employed? Would any man, seeing a house put up to auction as a house to be sold subject to a ground-rent lease, suppose that the word ground-rent meant rack-rent? The case in *Strange* proves that the same words may bear different meanings, with reference to the context. But, according to the construction here contended for, the word would have no meaning at all.

The subject of the contract, therefore, does not answer the vendor's description of it; and that in a point so material as to exclude the doctrine of compensation, which ought never to be applied to a case like the present.

Motion refused, with costs (*a*).

(*a*) Vide the *Duke* of *Norfolk* v. *Worthy*, 1 Campb. 337, where Lord Ellenborough was of opinion that a clause providing "that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it," was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled; and accordingly left it to the jury to determine on the intention to mislead.

1815.

## WOOD *v.* GRIFFITH.

*December 7.*

Petition for a rehearing, ordered to be taken off the file, on the ground of its making a different case from that on which the decree was pronounced. *Qu.* Whether, by consenting to an order consequential on a decree, the party so consenting precludes himself from the right of appeal?

DECREE at the Rolls, 22d of *March*, 1814, for Defendant to join with the Plaintiff in sale of the premises in question, and for a reference to the Master to settle an authority for that purpose.

The minutes were objected to by the Defendant, but afterwards settled with his consent, and the decree passed and entered accordingly.

Various delays were afterwards interposed by the Defendant, in signing the authority which the Master had settled, but which was at length signed; and, on the 23d of *May*, 1815, an order was obtained by Plaintiff, and consented to by Defendant, for referring it to the Master to settle and approve a particular and conditions of sale.

The Master's report upon this last reference was dated the 3d of *August*; and, shortly afterwards, the Defendant presented a petition of Rehearing, and obtained an order, dated the 18th of *August*, for setting down the cause to be reheard.

Plaintiff now moved that the petition may be taken off the file for irregularity, and the last-mentioned order discharged, with costs.

The grounds made for this motion were, that the petition was irregular, inasmuch, first, as it introduced matter which was not on the record in the cause, and omitted to state the proceedings had since the decree was pronounced: and, secondly, as the De-

1815.

WOOD
v.
GRIFFITH.

fendant had, by his consent to the order of 23d *May*, 1815, precluded himself from the right to appeal.

The general order of the 5th of *June*, 1725 (*a*), limiting the time for presenting a petition of appeal from the Rolls to one month after the decree pronounced, was also referred to, but not insisted on; the practice having been long at variance with the order.

Sir *Samuel Romilly* and *Cooke*, in support of the motion.

Evidence not read in the original hearing may be read on an appeal from the entire decree (*b*); but this rule does not extend to permit the Appellant to examine *de novo*, and introduce intirely new evidence into the cause.

A decree by consent cannot be appealed from. (*c*) Shall, then, a party who, after decree, has consented to the most important directions contained in that decree, be suffered to do so?

The order by consent in this cause is a standing order of the Court, amounting to a complete confirmation of the decree. If that decree should be reversed, still the order remains, and is irreversible, no notice of it being contained in the petition. The Master will therefore be bound to execute it, notwithstanding the decree on which it was founded is no longer in force.

(*a*) Beames's Orders in Chancery, 334. The word "appeal" is introduced in this order; but it is, in truth, a rehearing. *Buckmaster* v. *Harrop*, 13 Ves. 457, 8.

(*b*) *Hedges* v. *Cardonnel*, 2 Atk. 408. And see Wyatt's Pract. Reg. 34. and cases referred to in the margin.

(*c*) *Harrison* v. *Ramsey*, 2 Ves. 488. *Bradish* v. *Gee*, Amb. 229.

*Hart* and *Spranger*, for Defendant.

1815.

WOOD v. GRIFFITH.

Admitting the general principle, that a decree or order of the Court by consent operates to preclude all parties from taking any objection after it is passed, a distinction must however be taken between such orders as are, in fact, of the essence of the decree itself, and those which are merely consequential upon it.

A party intending to appeal, may yet, to save the expence of a contest in every stage of the proceedings, consent to the performance of certain acts of obedience in the Master's office without relinquishing his right to do so; and the inconvenience of this is remedied by the rule, that he shall be made to pay costs of such intermediate proceedings.

If the decree is reversed, all the intermediate proceedings must fall together with it.

*The Lord* CHANCELLOR,

*Dec.* 21.

After looking into the petition and considering all the circumstances of the case, ordered the petition to be taken off the file, on the express ground that it made a case different from that on which the decree was founded, by introducing circumstances not before the Court at the time of making that decree.(*a*)

(*a*) See *Dashwood* v. Lord *Bulkeley*, 10 Ves. 237, 8. and *White* v. *Fussell*, 1 Ves. and B. 153; cases in which the Court has permitted additional evidence to be gone into on a rehearing.

In *Walker* v. *Symonds*,

1815.

WOOD
v.
GRIFFITH.

On the other ground, that by consenting to the order of the 23d of *May*, the Defendant had precluded himself from his right of appeal, his Lordship observed, that he should have great difficulty in saying, that the obtaining of that order by the Plaintiff had so precluded him, notwithstanding his consent thereto. The order by consent ought to have been inserted in the petition.

4th of *August*, 1810, *Roupell* moved, on a rehearing before the *Chancellor*, for leave to prove exhibits *vivâ voce*, which were not proved on the hearing at the Rolls; and the motion was granted, saving just exceptions. Reg. lib. fo. 1361.

*Dec.* 21.

## *Ex parte* SIMPSON, in the Matter of ASHTON.

Rule, not to be departed from, that joint creditors shall not be permitted to vote in the choice of assignees under a separate commission. Application by such creditors, on the ground of having a predominant interest, for an inspector, refused, till after the choice of assignees.

A SEPARATE Commission issued against *Ashton*, at the instance of a joint creditor; the partner of *Ashton* being out of the kingdom at the time, under circumstances precluding an act of bankruptcy, so that the ordinary course of taking out a joint commission against the two could not be resorted to.

The petition by joint creditors, stating that the partnership property was considerable, and that the petitioning creditor would carry the choice of assignees under his commission, prayed that the joint creditors might be admitted to vote in the choice of assignees. The

separate creditors were stated to be inconsiderable as to the amount of their debts; but it did not appear how far their debts would influence the choice of assignees.

*Rose* in support of the petition.

*Cullen*, for the petitioning creditor, did not oppose.

*The Lord* CHANCELLOR,

The rule is established, and not to be departed from, that joint creditors cannot vote in the choice of assignees under a separate commission.

On the part of the petition, an application was then made for an inspector, on the ground of the creditors who presented the petition having a predominant interest.

But the *Lord Chancellor* held that this application was premature, and directed the petition to stand over till after choice of assignees, giving the petitioners liberty to apply if circumstances should render it necessary.

N. B. In the case of *Ex parte Laycock*, (*a*) the *only separate* creditor's debt was to the amount of £4; and in that of *Ex parte Taylor*, (*b*) the debts of the

(*a*) 1 Rose, 32. This appears to be the same case with *Ex parte Jones*, 18 Ves. 283.

(*b*) 18 Ves. 284.

1815.

*Ex parte* SIMPSON In the Matter of ASHTON.

separate creditors were stated to be greatly overbalanced by the single debt of the petitioning creditor, who consented to the application.

ROLLS.

*Dec.* 8th.

## SLUYSKEN *v.* HUNTER.

Deed-poll, found cancelled among the papers of the grantor, after his decease, decreed, under the circumstances, to be enforced.

IN the month of *July*, 1777, *John Hunter*, (being then resident at *Bombay*, carrying on the business of a merchant in partnership with *Stephen Iveson* and *David Fell* under the firm of *Hunter*, *Fell*, and *Iveson*,) executed a deed poll, whereby he gave to the Plaintiff, *Susannah Sluysken*, widow, (then *Susanna Basset*, spinster, also resident at *Bombay*,) "the sum of 6575½ rupees; the interest whereof, at the rate of 9 per cent, amounting to 600 rupees annually, was to be paid to Plaintiff yearly and every year during her natural life, from the 2nd of *September* then last; and, at the decease of the Plaintiff, the same was to revert to him the said *John Hunter* or his heirs, unless Plaintiff should die leaving a child or children lawfully begotten; and, in that case, the said 6575½ rupees should devolve to such child or children, and should be divided equally between them share and share alike; and the said sum was thereby made chargeable upon the estate of the said *John Hunter*, and payable by his heirs executors administrators and assigns; and he appointed the said *Iveson* and *Fell* trustees to see his donation faithfully fulfilled."

Upon the execution of this instrument, it was delivered by the grantor to his said partners and trustees,

who paid the interest, as the same became due, to the Plaintiff, till the departure of *Fell* from *Bombay*, and the death of *Iveson*; after which, the deed was delivered, for safe custody, to one *Farmer*, an agent of the Partnership, who gave the Plaintiff a receipt for the same, and continued to pay the interest to the month of *July*, 1795, previous to which, the Plaintiff, being then a married woman, had left the *East Indies*, and come to reside with her husband in *Holland*. The bill alleged that no further payments had been made on account thereof since the time of her departure.

In 1796, the grantor, *John Hunter*, left the *East Indies*, and came to reside in *London*; and, in 1799, Plaintiff and her husband applied to him for payment of the arrears then due, in answer to which application he sent to the husband a letter, dated the 15th of *February* in that year, containing these words: "I wish to pay you to this period; and I wish, with your consent, to invest the principal sum in the funds of this country; and you may then, twice in a year, receive from a trustee, to be appointed on the occasion, the dividends arising therefrom." Upon the receipt of this letter a negotiation took place, which was interrupted in consequence of a disagreement between the parties relative to the rate of interest, *Hunter* insisting that, as he was no longer resident in the *East Indies*, the amount of the arrears ought to be calculated, not at 9 *per cent.* but at 5 *per cent.* only.

After the death of her husband, the Plaintiff, who was his administratrix, caused another application to be made to *Hunter* by her agents in *England* respecting the arrears and the form of a power of attorney, which was necessary to enable them to receive the same; in answer to which, *Hunter* wrote a letter,

1815.

SLUYSKEN v. HUNTER.

dated the 22d *December* 1801, containing no objection to the demand, but requiring further time to settle the proper form of such power of attorney; and early in the year 1802 he died, having appointed the Defendant his executor and residuary legatee, against whom the bill was filed, praying an account and payment to Plaintiff of what was due in respect of "the said annual sum of 600 rupees," and "that the value of the said 6575½ rupees might be ascertained and invested, and the dividends and interest paid to the Plaintiff during her life; and that the Defendant might also pay to the Plaintiff during her life, by half yearly payments; "such sum of money as, together with such half yearly dividends, should be equal in value to the sum of 300 rupees;" and for an account of the personal estate of the testator.

The Defendant, by his answer, stated that the deed poll was executed by the testator voluntarily and without consideration; that, at or about the time of the first application made by the Plaintiff and her husband, the testator, in a conversation with the Defendant, expressed his intention to put the business in a state of settlement, and asked the Defendant if he would act for him in case there should be occasion, which he the Defendant consented to do, but was not afterwards called upon to take any part therein; that, in looking over the papers of the deceased for materials to answer the bill, there was discovered, so lately as the 15th of *October* 1813, the said deed poll, dated the 2d of *September* without any year stated, in a completely cancelled state, the name of the said *John Hunter* and the seal (if any seal had been affixed thereto) being both torn off; that from the conversation aforesaid, and the fact of no interest having been paid on the said eed poll since *July* 1795, the De-

fendant was inclined to believe that some arrangement had been made between the parties; that he knew not how the deed came into the testator's possession, and could not otherwise account for finding it among his papers in such a condition than by supposing that it had been delivered up in consequence of some such arrangement; submitting, therefore, that the same must, at this distance of time, be presumed to have been duly satisfied; and if not, that in consequence of the testator having withdrawn all his property and effects from the *East Indies* immediately after the last payment in 1795, the Plaintiff could only be entitled to interest on the said sum of 6575½ rupees according to the legal rate of interest in this country.

There was no evidence, on either side, tracing the deed out of the possession of *Farmer* into the hands of the testator; or of any payments in respect thereof subsequent to that made in *July* 1795.

The suit, having become abated by the death of the Plaintiff Mrs. *Sluysken*, was afterwards revived by her daughter who, as the only child of the deceased living at her death, claimed to be entitled to the principal sum of 6575½ rupees with interest as directed by the deed.

Sir *Samuel Romilly* and *Dowdeswell*, for the Plaintiff.

*Hart* and *Bell*, for the Defendant.

The Plaintiff must shew a case in equity of such a debt as might have been received in a court of law, supposing the instrument to be still entire; otherwise

1815.

SLUYSKEN v. HUNTER.

he can have no assistance here. This is the case of a mere voluntary instrument, on which no relief could have been obtained at law. A deed being cancelled is the best evidence of a complete acquittance. At law there is no possibility of recovering on such an instrument. It is true, that some late cases (a) have allowed the proceeding upon evidence of a deed which is lost, but none upon a deed which is cancelled. Suppose, in equity, that a bill were brought by the obligee of a bond stating such circumstances as the present, would it not be a sufficient answer that the bond is in the possession of the obligor cancelled? Then there was a receipt given to the Plaintiff at the time of depositing the deed for safe custody with *Farmer*. Why is that receipt not forthcoming? No doubt, because it was delivered up by the Plaintiff at the time of the arrangement being made, in consequence of which the deed was cancelled. The finding of the deed then, in its present state, is at least *primâ facie* evidence of a discharge; and it lies upon the other party to shew that it was so cancelled by fraud, accident, or mistake.

In answer to a question of the *Master of the Rolls*, Sir *Samuel Romilly* informed the Court that the reason of the bill not being sooner filed was that the Plaintiff had, till a short time previous to the filing thereof, been in the situation of an alien enemy and therefore unable to sue.

The question raised by the answer respecting the rate of interest was declined to be argued, as being fixed by the terms of the instrument.

(a) So in *Read* v. *Brookman*, 3 T. R. 151. and *Hendy* v. *Stephenson*, 10 East, 55.

*The* MASTER *of the* ROLLS,

1815.

SLUYSKEN *v.* HUNTER.

If there were any serious doubt as to the original validity of the instrument, it would be a fit case to be sent to law. If not, then can it be presumed that it was cancelled by fraud, mistake, or accident? It would be strong evidence of its having been so improperly cancelled, to shew that no compensation had ever been made to the Plaintiff. *Hunter* could not legally cancel it, without first satisfying the debt. Now it does not appear that this instrument ever came into the Plaintiff's possession. It was originally in the hands of *Hunter*'s partners; then came into those of *Farmer*, with whom it was deposited for safe custody. So far the Plaintiff never was entrusted with the custody of it; and here the history drops. It seems that it was never intended to entrust the instrument to the Plaintiff. Is there, then, any and what presumption that it did get into her hands notwithstanding; and that, having done so, it was afterwards given up by her in consequence of an arrangement with *Hunter*?

It is clear that this could not have been the case previous to the month of *December* 1801, when the application was made for the arrears. If, then, there was any adjustment at all, it must have taken place between that period and the death of *Hunter*, only two months after it. Is there any circumstance to render it probable that such an event did actually occur? On the contrary, the conversation referred to points at no such intention. He asks the Defendant if he would be willing to act, should there be occasion. This looks more like creating a trust than as pointing to a settlement of the business, which, if made, might as well have been without any intervention of the Defendant.

1815.

SLUYSKEN v. HUNTER.

There could be no occasion for the appointment of a trustee, supposing the principal money to be paid.

To presume such an arrangement, therefore, would be to presume what is altogether imaginary. But it is said, that the cancellation of the instrument can be accounted for on no other supposition. What probability is there in the supposition itself? Is it any way likely, or is it at all within the bounds of credibility, that such a transaction could have taken place, that the payment of so large a sum could have been made, without any entry in *Hunter*'s books, without cheque, receipt, or document of any description whatever? . . . and that to some unknown person, for the use of parties resident in *Holland*?

In the absence of all such testimony, it is much more natural to conclude that the instrument was improperly cancelled. I say, improperly, without imputing a design to defraud. But who can say what accident might have happened to the paper, through mere mistake or carelessness, between the time when all trace of its history vanishes and the death of *Hunter*; or again, between the death of *Hunter* and the discovery which ensued upon the filing of the bill?

With regard to the value of the rupees, *Bell* referred to the case of *Cockerell* v. *Barber*, (*a*) as deciding the question; but it was agreed that, if any dispute should arise, it must be brought before the Court by way of exceptions to the Master's report.

(*a*) 16 Ves. 461. The case of Lord *Dungannon* v. *Hackett*, 1 Eq. Ab. 288, was also mentioned.

1815.

SLUYSKEN v. HUNTER.

"Refer it to the Master to take an account of what is due to the Plaintiff for principal and interest on the deed poll, or instrument, in the pleadings mentioned, according to the rate of interest therein mentioned; and the Defendants, by their answer, admitting assets, let the said Defendants pay to the Plaintiff what the Master shall so find due for principal and interest as aforesaid. The Master to tax all parties their costs of the suit, to be paid by the Defendants out of the testator's estate."

## HOLDEN v. HAYN and BACON.

ROLLS.

Bill for specific performance of an agreement to purchase, against the original vendee and an assignee of his contract, dismissed as against the former, the Plaintiff being held, by delivery of abstract and offer to execute a conveyance, to have accepted the latter as purchaser. Qu. If the bill had been filed against the original purchaser only.

ON the 24th of *May* 1811, the Defendant *Bacon* signed an agreement to become the purchaser of an estate from the Plaintiff, at the price of £10,100, payable by instalments.

On the 31st of *May*, *Bacon* assigned all his right and interest in the said agreement to the other Defendant *Hayn* for £800 over and above the purchase-money.

The abstract of title was delivered by the Plaintiff to the Defendant *Hayn* who paid the two first instalments to the Plaintiff when they respectively became due and was admitted into possession on the day stipulated by the agreement; and the bill, filed after the third instalment became due and possession so taken,

1815.

HOLDEN *v.* HAYN and BACON.

prayed that *Hayn* and *Bacon*, or one of them, might be directed to pay to the Plaintiff the amount thereof, with interest, from the day on which it was payable, and to secure the remainder of the purchase money by mortgage of the estate upon the Plaintiff's executing and delivering to *Hayn* a proper conveyance, and for a specific performance, or that, in case *Hayn* should refuse to accept such title as Plaintiff was able to make, the agreement might be rescinded and *Hayn* restore the possession; also for an account against *Hayn* only.

*Feb.* 18, 1814.

The decree made on the hearing of this cause referred it to the Master, to enquire and state to the Court who were the necessary parties to join in the conveyance to be made according to the terms of the agreement; and the Master, by his report, certified (among other things) the facts abovementioned, and that he conceived the Plaintiff and one *Dashwood* to be the necessary parties to join in such conveyance.

*Dec.* 12, 1815.

This day the cause came on to be heard upon further directions, when it was contended, for the Defendant *Bacon*, that he was unnecessarily made a party to the suit, and that the bill ought to be dismissed as against him.

*Leach* and *Grimwood*, for the Plaintiff.

*Hart* and *Benyon*, for the Defendant *Bacon*.

Sir *S. Romilly* and *Roots*, for the Defendant *Hayn*.

*The* Master *of the* Rolls. 1815.

Holden *v.* Hayn and Bacon. *Dec.* 13.

If the bill had been filed against *Bacon* only, it might have been a question whether the circumstances amount to a waiver of the original contract and acceptance by the Plaintiff of the other Defendant as purchaser in his place. But here *Bacon* has all along been treated as a mere formal party; and the offer made by the bill is to convey to *Hayn*, or such person as he shall appoint. Not a word of any conveyance to *Bacon*. It is therefore by the act of the Plaintiff himself that *Hayn* is placed in the situation of purchaser, and he only.

Bill dismissed, as against *Bacon*, without costs. *Hayn* decreed specifically to perform his agreement and to pay Plaintiff his costs of the suit.

## MUSGRAVE *v.* MEDEX.

*Dec.* 11.

Order on sureties to pay money into Court, on forfeiture of recognizance entered into on a *ne exeat.*

IN this case, it having been referred to the Master(*a*) to see whether it would be for the benefit of the parties to the original suit, that a suit should be instituted against *Isaac Medex*, the son of the Defendant *Moses Medex*, and *Isaac* having consented to be made a party to the suit already depending; the Master reported, and *Isaac* was made a Co-defendant with his father, accordingly.

(*a*) 3 Ves. and B. 167.

1815.

MUSGRAVE v. MEDEX.

An order for a *ne exeat* afterwards issued against the Defendant *Isaac*, who entered into the usual bond, by himself and a surety, not to go out of the kingdom without leave of the Court. Shortly after putting in his answer, he went abroad without permission; and an application was this day made to the Court, on the part of the Plaintiff, that the other Defendant, *Moses Medex*, may pay into Court the sum for which the writ was marked, he having agreed to be answerable for *Isaac*; or, in default thereof, that proceedings may be had upon the bond given by *Isaac* and his surety.

Sir *Samuel Romilly* and *Hart* in support of the motion.

*Leach* contrà.

Ordered accordingly.

*Jan.* 20, 1816.

After the vacation, *Leach* moved to discharge this order, upon circumstances under which, he contended, that the money had in fact been already paid by the Defendant *Isaac Medex* previous to his going abroad. But the *Lord Chancellor* was of opinion that the question had nothing to do with the present application; and the motion was refused with costs.

In the course of the argument, *Hart* mentioned the following case of *Utten* v. *Utten*, in which, though a case of inadvertence, (which the present was not contended to be,) the Court would not grant the indulgence sought to be obtained.

1815.

## UTTEN v. UTTEN.

*Dec.* 14.

UNDER similar circumstances with the preceding case.

Sir *Samuel Romilly* and *Parker*, for Plaintiff, moved that the bond may be ordered to be delivered over to, and put in suit by, Plaintiff, against Defendant and his sureties.

*Hart* and *Mascall*, for the sureties, suggested that the money claimed by the Plaintiff in this cause, was on account, and not yet proved to be actually due; that the Defendant had put in an answer which was not excepted to; and that the Defendant had gone abroad under a mistake as to the effect of his bond, the condition whereof he presumed to be satisfied by the putting in of his answer; therefore requesting that the sureties may be discharged on entering into recognizances to abide the event of the cause.

Sir *Samuel Romilly* in reply, observed that, although a party was sometimes allowed to give security to abide the event of a cause, this could be only done in respect of a private transaction, not where he had been guilty of violating an order of the Court.

*The Lord* CHANCELLOR

Ordered the money to be paid into Court within six months, together with costs of the application.

1815.

Dec. 19.

## BURROUGHS v. OAKLEY.

Vendee in possession, objecting to title, required to pay his purchase money into Court, although the fact of possession appeared, not upon the pleadings, but upon affidavit only.

ON the 12th of *June*, 1812, the premises in question were put up to sale by public auction; and among the conditions of sale, were the following, viz. each purchaser to pay a deposit of 20 per cent. on the purchase money and sign an agreement to pay the remainder on or before the 31st of *August*, 1812, on having a good title; and, if any delay should arise in completing the purchase beyond the said 31st of August, the purchaser to pay interest on the remainder of his purchase money, at 5 per cent. from that period.

The Defendant becoming the purchaser at this sale paid the deposit and signed a memorandum to complete his purchase according to the conditions.

On the 31st of August, he was let into possession.

In 1815, the Vendor filed his bill for a specific performance. The bill contained no allegation that the Defendant had taken possession; nor did the Defendant's answer admit it: it merely stated the agreement, but disputed the title.

This day, the Plaintiff moved, on affidavit, that Defendant might pay his purchase money into Court, with interest, from the time of being let into possession. The affidavit stated the fact of taking possession, and a correspondence which had taken place between Defendant's Solicitor and Plaintiff, explaining away the objections to the title, and calling repeatedly on De-

fendant to take the conveyance, which had been prepared, without obtaining any satisfactory answer.

Sir *Samuel Romilly* and *Eden* in support of the motion, cited *Gibson* v. *Clarke* (*a*).

*Rose*, for the Defendant,

The cases in which the Court has interfered to take purchase money out of the hands of the purchaser, are of recent decision. In that referred to, the circumstance of not making good the title was a mutual surprise on both parties; a feature which is wanting in that now before the Court. Also, in all the former cases, the bill has prayed, in addition to the prayer for a specific performance, that the Defendant may pay the money into Court or deliver up the possession. Here, the fact of the Defendant having been admitted into possession is not stated in the bill;—consequently, no part of the relief prayed is founded upon it; and the present motion is only grounded on affidavit.

*Dec.* 22.

*The* LORD CHANCELLOR said that, though there is no case in which the Court has acted on affidavit, yet its interference may be justified by the circumstances. In this case, although the contract in terms seemed to contemplate delay, that could mean only reasonable delay, and not such as should arise out of obstacles appearing to be created by the Defendant himself. It

(*a*) 1 Ves. and B. 500. See also, *Clarke* v. *Wilson*, 15 Ves. 317. *Smith* v. *Lloyd*, *Maddock*, 83.

1815.

BURROUGHS v. OAKLEY.

was, therefore, a case in which the Court would take the purchase money into its own keeping.

Ordered accordingly.

*July* 3 and 26. *Dec.* 14 and 21.

**JOHN PRITCHARD *v.* FLEETWOOD, and the Assignees of JOHN PRITCHARD the Younger (a).**

If a purchaser of the legal estate in lands, subject to an equitable rent-charge, refuse to pay the rent-charge, a receiver will be appointed.

THE Plaintiff was entitled to two equitable rents-charge, one of £50. *per annum*, and the other of £47. *per annum*, issuing out of estates of the bankrupt, *John Pritchard* the younger. And he claimed to be entitled to another equitable rent-charge, of £50. *per annum*, issuing out of the same estates.

The Defendant *Fleetwood* was mortgagee in possession of the estates, and had paid the three rents-charge, from the 22nd of September, 1810, the date of his mortgage, down to the 8th of October, 1814, when the commission of bankrupt issued against *J. Pritchard* the younger. Shortly after that event, notice was given to *Fleetwood* that the assignees under the commission disputed the validity of the last mentioned rent-charge.

The bill prayed an account and payment of the three rents-charge. And, on the coming in of the answers, *Hart* now moved, on the behalf of the Plaintiff, for a receiver. The motion was opposed by *Haslewood*, for the Defendant *Fleetwood;* and by *Wilson*, for the Assignees.

(a) *Ex Relatione.*

LORD CHANCELLOR. 1815.

PRITCHARD v. FLEETWOOD.

When a person takes a conveyance of a legal estate subject to equitable interests, he must satisfy those interests, or submit to the appointment of a receiver. It seems reasonable that the arrears and growing instalments of the two annuities to which the title is not disputed should be paid to the Plaintiff, and that the arrears and growing instalments of the other annuity should be paid into Court. I cannot, in this stage of the cause, make an order for such payments, unless by consent. But, if Mr. *Fleetwood* consents to such an order, I shall refuse the application for a receiver.

*Fleetwood* consenting, the order was made.

## MILLS v. FARMER.

Testator "directs" the residue of his personal estate "to be divided for" certain charitable purposes mentioned by him, "and other "charitable purposes as I do intend to name hereafter." He afterwards makes a codicil, and names no charitable purposes. Held, a disposition of the residue in favour of charity, to be carried into execution by the Court, having regard to the objects particularly pointed out by the testator.

JAMES *Mills*, by his will, dated 23rd of *June*, 1806, in the first place directed that all his just debts and funeral expences, and all the legacies which he should give by his said will, or by any codicil, should be paid as soon as possible after his decease; and then, after giving several pecuniary legacies to a considerable amount, to certain of his relations and other persons, and after appointing the Defendant *Farmer* and ano-

1815.

MILLS v. FARMER.

ther, his executors, with equal legacies, proceeded in the following words, "The rest and residue of all my "effects I direct may be divided for promoting the gos- "pel in foreign parts and in England for bringing up "ministers in different seminaries and other charitable "purposes as I do intend to name hereafter after all "my worldly property is disposed of to the best ad- "vantage."

Afterwards, on the 14th of *August*, 1807, he addressed a letter to his executors, as follows:—"Dear gentlemen,—In case of illness or death, I have sent to Messrs. *Robarts* and *Curtis*, a box in which is my last will and testament, and several writings," which are specified. He then requests that, in lieu of what he had bequeathed his executors, they would accept £500. each, and divide his wine between them; and that certain other persons, named in the letter, might receive some other specific and pecuniary legacies; and concludes thus:—"It is needless to have any of my relations attend my funeral, as it is apt to breed ill will amongst them; and their grief on such occasions, is generally attended with hypocrisy; therefore, be pleased to accept of these trifles, with my best wishes; and I pray that God may guide you."

The testator died after writing this letter, which was proved by his executors, together with the will, as a codicil thereto.

The bill was filed by the next of kin, praying an account, and distribution of the residue as being undisposed of by the will and codicil of the testator.

The *Attorney General*, who was a party Defendant to the suit, claimed the residue as given to charity.

1815.

Mills v. Farmer.

ROLLS.

Jan. 29, 1811.

This day, the cause came on to be argued before his honour the *Master* of the *Rolls*.

The case was but little argued; but, on the part of the *Attorney General*, was treated as decidedly in favour of charity, on which his honour said (a) " That, so far from its being a case upon which there could be no doubt of its being a bequest substantially to charity, he was clearly of opinion, that it must be held void for uncertainty; for that, in the first place, two or three vague objects of charity were mentioned, between which, so named, and other objects of charity which he professed a design of naming afterwards, the testator expressed a *future intention* to divide his property;" and asked, " how it was possible to say, in the absence of all subsequent specification, what portion the testator intended to give to the purposes he had named, and what portions to those which he intended to name, but did not name? How could it appear whether he intended to give a fortieth, or a fiftieth, or a hundredth part to both or either of the purposes mentioned;" therefore declaring, " that, as well on those grounds, as also from the plain meaning of the clause, as altogether referable to a future specification of particulars never afterwards made, the clause must be decreed to be void for uncertainty."

And so decreed accordingly.

Against this decree at the Rolls, the *Attorney General* presented a petition of rehearing; and the cause coming on upon rehearing before the *Lord Chancellor*, at different times before the end of the sittings

(a) *Ex Relatione.*

1815.
MILLS
v.
FARMER.

after *Trinity* Term, was at last set down for judgment, when his Lordship made the following observations:—(a).

*The* LORD CHANCELLOR.

*Aug.* 23, 1815.

*(After stating the case).* This matter was brought forward by means of a bill filed by the Plaintiff *Mills*, and others, insisting that they were entitled to the residue of this estate, the *Attorney General* being made a Defendant in order to raise the question, whether this clause was an effectual bequest of the residue for charitable purposes. I understood, upon enquiry, that, when the cause came on at the Rolls, the matter was stated in this way; namely, that this was a bequest too uncertain to be valid and effectual, and, therefore, that the residue belonged to the next of kin. That was the whole of the argument then submitted to the Court on the part of the next of kin. On the other hand, I do not find that there was any argument on the part of the *Attorney General*; and his honour accordingly delivered a judgment which I have seen, and which amounts to this:—

(Then, after stating the grounds on which his honour's decree was founded, as above given, the *Lord Chancellor* thus proceeded:—)

Now in the first place it is to be considered, whether, supposing that the words "other charitable purposes as I do intend to name hereafter," can have no effect whatever as to such other charitable purposes, for the want of naming them; it therefore follows that

(a) *Ex Relatione.*

the objects which are specifically named are not to be at all attended to; and the next thing to be considered is, whether it can be determined, consistently with former decisions, that where a testator gives his property to such charitable purposes as he intends to name thereafter, if he die without naming any, this Court will not hold that his general intention to give to charity is sufficiently expressed so as to operate as a gift to charity, and therefore place itself in the room of the testator in naming the specific objects of that intention. A third question is, if a testator give the residue of his property to *A.* and *B.*, and such other person as he shall hereafter name, to be divided between *A.* and *B.* and such person so to be named hereafter, and die without having named, whether that bequest shall fail altogether as to the two already specified; or whether, by construction of law, the whole residue will not pass to them?

That these questions are, all of them, of great importance with reference to the general doctrines of this Court, is beyond all doubt. There is a case so long ago as in 2 *Freeman* (*a*), to which I can find no contradiction elsewhere, although I should be glad to meet with sufficient ground to over-rule it judicially;

(*a*) 2 Freem. Case 330. "In Cur. Canc. 1702. It "was said, and not denied, "that if a man deviseth a "sum of money to such cha- "ritable uses, as he shall "direct by a codicil to be "annexed to his will, or by "a note in writing; and af- "terwards leaves no direc- "tion, neither by note nor "codicil, the Court of Chan- "cery hath power to dis- "pose of it to such charit- "able uses as the Court "shall think fit: and so it "was held in the case of "Mr. *Sidrofen's* will, and

1815.
MILLS
v.
FARMER.

but not finding any, it is authority enough for me to say, that the present case ought not to be disposed of, as if there could be no argument respecting it. Now, whether the doctrine in the case referred to be to avail or not in such a case as the present, I do not yet say; but it is proper that the point should be decided. Subsequent cases do not go the length of confirming that laid down in *The Attorney General* v. *Siderfin* (a), which I know to be accurately reported, having seen the very papers that were made out when that case was argued, and which have been preserved to the present day. I saw them in the hands of a gentleman to whom they had been transmitted. They are now a hundred years old. That case was this. A testator left money to be disposed of to such charitable purposes as he had mentioned in a paper which (as stated in his will) would be found at his death. He died, and the paper was not to be found. One would suppose the Court would have said that, as the paper was not to be found, it must be presumed to have been

" in the case of one *Jones*; " but if the will points at " any particular charity, as " for maintenance of a " schoolmaster or poor wi- " dows, then the Court of " Chancery ought not to di- " rect it to any other pur- " pose but such as is pointed " at by the will; as if the " devise should be for such " school as he should ap- " point, and appoints none, " the Court may apply it for " what school they please, " but for no other purpose " than a school, although it " may be for what school " the Court thinks fit."

(a) 1 Vern. 224. 1 Eq. Ab. 96. This is the case referred to by the note in *Freeman*, under the name of " the case of Mr. *Sidrofen*'s will." S. C. cited from the Register's book, 7 Ves. 43. note, as " the *Attorney General* v. *Siderfin*."

destroyed, or, at least, would have sent it to a jury to try the fact of its ever having existed: but, instead of this, it was held that the words shewed a general intention in favour of charity, and that, as the particular objects of such intention could not be discovered, the Court would designate those to which it should be applied; and accordingly the Court gave it to Christ's Hospital.

Now I should have wished, very respectfully to his Honour the *Master* of the *Rolls*, that the present case had been heard by him as fully as that case must have been heard. And since the parties have determined to bring it before me, I must desire to have it argued over again; since it is a case which, if I affirm the decree, must destroy a great deal of doctrine to be collected from former decisions; or, if I reverse it, it must be on grounds very different from any that appear to have been touched upon in the Court below.

The point which I should wish to have argued in favour of the next of kin is, that the doctrine stated by *Freeman* is not supported by subsequent cases, and that such subsequent cases have been those in which the testator had actually devoted the residue of his property to charitable purposes, but, in consequence of some act afterwards performed by him, or of the omission of some act necessary to be performed, it had become impossible to find out the object of his intended benevolence.

In consequence of the request made by the *Lord Chancellor*, the cause was set down to be argued by

1815.
MILLS v. FARMER.
*Nov.* 7.

one Counsel on each side on, the second day of *Michaelmas* Term, when it came on accordingly.

Sir *Arthur Pigott* for the *Attorney General.*

*Leach* for the next of kin.

For the *Attorney General.*

The question is, whether, upon the face of the will, the intention of the testator to devote the whole residue of his property, is, or is not, so expressed, as that the Court will carry that intention into execution; whether the Court will say, that neither the whole nor any part of the residue is so devoted; or that, according to the rules of the Court, it must be considered to be disposed of for such charitable purposes as the Court shall think fit to designate.

With reference to the intention of the testator, as appearing upon the will itself, it is material, in the first place, to observe that the parties claiming this residue as undisposed of and therefore distributable among themselves as the next of kin of the testator are named as legatees in the will in such proportions as he thought proper to assign. (*a*) From the residuary clause it is evident that the legacies so given were intended by him as a sufficient and suitable provision for each. In that clause he uses the word "direct" imperatively; and, by that word "direct," has, as I contend, effectually excluded the arguments which have arisen upon the will. It is

(*a*) It does not appear, from the case, that *all* the next of kin had legacies, or were named in the will, notwithstanding this ground was taken in the argument.

not recommendatory only, but a positive injunction that his residue is to be applied "for promoting the Gospel in foreign parts and in *England* and for bringing up Ministers in different seminaries" after all his worldly goods shall have been disposed of to the best advantage; and he concludes by reserving to himself a power of naming other charitable purposes thereafter.

Now, if this decree is to stand as pronounced by his Honour the *Master of the Rolls*, the principle upon which the decree was founded will be affirmed together with it; and I must beg leave to say, it is impossible that your Lordship can so give effect to it without placing the law on this subject in a state of uncertainty and confusion, without introducing (that greatest of all evils, except a corrupt administration of justice,) a shifting and variable exposition of the law, setting authority against authority, and leaving no fixed principle upon which judges can act in future cases. Considered in this light, therefore, I am so far from thinking the decree now submitted to the revision of the Court indifferent in its nature; that, on the contrary, I esteem it as of importance in the highest degree, in which the doctrines and practice of this Court can ever be held as important.

It would be great injustice to the learned Judge who pronounced this decree, to suppose that the subject was fully brought before him, or the authorities now relied on in opposition to his opinion properly submitted to his consideration. In point of fact the case was otherwise. On the part of the *Attorney General* no discussion was attempted, for none had been imagined necessary; and, it having occurred to the learned Judge that the residuary clause was void for uncer-

1815.

MILLS *v.* FARMER.

tainty, he pronounced his judgment accordingly, and there the case ended. The *Attorney General*, however, thought it his duty to have it reconsidered; and directed the appeal to be brought.

That which is now contended on his part is, that there has been by this testator an absolute devotement of the entire residue of his property to charity, leaving nothing incomplete but the nomination of some of the objects to which it was his intention that it should be applied. "All the rest and residue" of his property he *directs* "may be divided," (that is, he absolutely devotes it to be so divided,) for disseminating the Gospel, and for bringing up Ministers in different seminaries, and for other charitable purposes which he intends thereafter *to name*. All, therefore, that rests in intention is *to name*, not *to devote*, for that he has done already; and he has done it in terms which cannot be more largely expressed, more comprehensive, or more descriptive of his intention, in terms which the Court has already held sufficient, as of themselves, to devote to charitable purposes. The gift, therefore, is complete. It is "to be *divided*;" a word which, in this case, cannot have the same sense and construction put upon it as if the bequest had been between individuals, where there might be a survivorship. There can be no survivorship between these charities; for the Gospel never dies; it is eternal: and the Ministers of the Gospel must exist for ever. Neither are the purposes here specified vague and indefinite, so that the bequest, on that account, must fail for uncertainty. On the contrary, they are sufficiently certain in their nature, and pointed out with sufficient precision, to enable the Court to act.

*The Lord* CHANCELLOR.

I take the argument in favour of the gift to charity to be this. The testator did not mean the "other charitable purposes" which he had in view to take effect at all, unless he should thereafter name them. Suppose I give to my nephews *A.* and *B.*, and such other person as I shall name hereafter. If I do not name that other person hereafter, shall *A.* and *B.* take nothing?

*For the Attorney General.*

If the bequest, in the supposed case of individuals, were so framed, as according to legal construction to constitute a tenancy in common, then *A.* and *B.* being entitled to one-third each, the remaining third would be left undisposed of. If, on the other hand, the terms of the bequest were such as to create a joint-tenancy, then I contend that, in the case supposed, it would constitute *A.* and *B.* joint-tenants of the whole; and that the bequest could in neither case be considered as having failed for want of designating the third person who was intended to take together with them.

But in the present case it is still less to be imagined that that omission is destructive of the bequest; on the contrary, there are circumstances which render it, in my apprehension, certainly to be presumed that the testator had changed his intention of naming a third object, and left the entire residue to go to those already named. In making the codicil, which he executed after the date of his will, his attention must have been called to the state in which his affairs were left by that will, which, as he must be supposed to have known, was confirmed by the codicil, and rendered of

1815.
MILLS
v.
FARMER.

one substance with it. From the omission, therefore, to name, in that codicil, the "other purposes" which he had formerly intended to mention, the only reasonable and consistent inference is, that he had abandoned those purposes, leaving his will valid and effectual as to the purposes already designated. But then arises the question, which was put by the *Master of the Rolls*, relative to the proportion in which this residue is directed to be divided: "How could it appear whether the testator intended to give a fortieth, or a fiftieth, or a hundredth part, to the purposes mentioned?" Suppose, then, that the testator had said, "I give my residue to be divided in such proportions as I intend to name hereafter:" would it be contended that, because he did not afterwards name the proportions, the bequest of the residue must therefore fall to the ground altogether? Yet what is that supposed case but the present? In this case also, the testator has not named the proportions; and since he has not named them, I contend, not that the bequest must therefore fail, but that the Court will distribute the subject of it in equal proportions.

In *D'Oyly* v. *The Attorney General* (a), where a testator gave "to such of his relations as were most deserving, and in such manner as his trustees should think fit, and for such charitable uses and purposes as they should also think most proper and convenient;" the Court directed that one-half of the estate should go to the testator's relations, share and share alike, and the other half to charitable uses, according to a scheme to be approved by the Master; the known rule,

(a) 2 Eq. Ab. 194. pl. 15. 4 Viner, 485. pl. 16. *et vide* the decree cited from the Register's book, 7 Ves. 58. *note*.

that equality is equity, being, as was said, the best measure to go by.

What I contend therefore is, that the whole is valid; that the clear manifestation of the testator's will to appropriate the whole of his residue to charitable purposes is not to be defeated by the accidental circumstance of his having omitted to state in what proportions it is to be distributed among such as he has thought proper to particularize. If there should yet remain any doubt upon this subject, I then submit, that the utmost length to which the Court could go, would be, to put the charities named on the same footing as the two individuals in the case supposed by your Lordship would be placed, supposing the words such as to operate a tenancy in common. And how can they be placed on the same footing in this instance, where, from the nature of the expressions used, it is, and must remain, absolutely uncertain what were the number and extent of those other objects which the testator had in view at the time of making this bequest? We are therefore forced back to my original position, which is, that effect must be given to the whole bequest.

The will, in the interpretation of common sense, amounts to this—"I devote the whole residue of my property to charitable purposes. As to some of those purposes my mind is made up—those, for instance, of promoting the Gospel, and bringing up Ministers in different seminaries. These purposes are fixed and decided, and I therefore declare them to be among the objects to which my residue is so devoted. Whether I may afterwards add to these objects others, about which my mind is not so fixed and decided, is at present uncertain; but whatever other objects I may

1815.

MILLS
v.
FARMER.

name hereafter, *I mean that my residue should be applicable to them as well as to those which I have named already.*" The words "other purposes as I shall name hereafter," can, consistently with the general intention before made manifest, be taken to mean nothing but "whatever other purposes I may name hereafter." What then is the consequence of his not having named any other purposes than those already mentioned? What, but that those already mentioned are alone to take? If I do name others, those others shall take together with those I have named; but if I do not name others, those which I have named shall exclusively take. Then comes the codicil, made fourteen months after the will, by which it is plain that he considered the will as complete, and had it not in his contemplation to make any further or other testamentary disposition. What is the operation of this codicil, but as if he had said, "the intention I formerly expressed of naming other charitable purposes is abandoned; and the latter part of the alternative must therefore prevail; namely, those objects must take which are named in the will?"

There was no occasion for his saying this in words. The alternative in his mind is sufficiently apparent from the introduction of the clause itself. If he had really intended that that clause should have no effect at all, unless he should afterwards make up his mind about giving his property to other objects besides those he had mentioned, he would have made no disposition whatever until he had so made up his mind. What possible purpose could it answer to express a mere intention, which was not to take effect unless he should do some other act in future, at the time of doing which it would be quite as easy for him to carry into effect his intention altogether? He might have actually intended, at the time

of making his will, to name other purposes; and with that view the introduction of the clause was very reasonable, securing his main object, the devotement to charitable purposes, and at the same time reserving the power of nomination as to some of those purposes, without afterwards disturbing his will as to others which he was determined should take effect at all events.

To come, now, to the consideration of the cases; the first circumstance which must strike us, with regard to the present, is, that it is infinitely stronger than many of those in which the Court has supported a testator's intention to give to charity; because in this there are fixed and certain objects of that intention which the testator has pointed out, and it is therefore not one of those imperfect cases in which the Court has taken upon itself to designate the objects. In a case where the property is given to trustees for the general purposes of charity, although the trustees shall have done nothing towards fulfilling the objects of the trust, the Court will take it out of their hands, and assume to itself the power which they have neglected to exercise. In the name of common sense, where is the difference between that case and this, in which the testator has named no trustees, but has devoted his property in as absolute a manner to charity as if he had created a specific trust for that purpose, and in which the Court is, therefore, fully as competent to assume the administration as in the other? What have the next of kin to do with this question? The testator has positively excluded them by providing for them, in the first place, out of his general property. He has said, I give a part of my property to my next of kin. Another part of it I give to charity. How can the next of kin claim both parts? And how can the

1815.

MILLS
v.
FARMER.

Court support their claims consistently with any shadow of deciding conformably to the testator's intention?

There would be some shew of pedantry in going through the authorities, after the very full and complete examination of them by your Lordship in the case of *Moggridge* v. *Thackwell* (a); a case which bears in itself so strong an analogy to the present, that it would be enough to rest upon your Lordship's decision in that single instance. That case was upon a clause in a will, bequeathing the residue of the testator's personal estate to a person therein named, as a trustee, to be disposed of by him in such charities as he should think fit, recommending a particular object of charity; and there, although the distribution was expressly confided to a certain person, who died long before the testatrix, and of whose death she had notice, yet it was held that the general intention must prevail, and that this Court would itself assume the administration and give effect to that intention by a reference to the Master, having regard to the particular object pointed out by the testatrix. In that case, as in the present, the next of kin claimed the legacy as lapsed by the death of the trustee to whom it was so expressly given; every authority that could be produced on either side was argued and sifted to the bottom; and your Lordship's decree was not only in affirmance of the decision of a former Lord Chancellor (b), but was itself affirmed on appeal to the House of Lords (c), so that the case in question constitutes the strongest authority that the highest sanctions in the law can create; and yet that authority must, I re-

(a) 7 Ves. 36. 3 Bro. 517. 1 Ves. jun. 464.

(b) Lord *Thurlow*, S. C.

(c) 13 Ves. 416.

peat, be shaken by the decree in the present case if it is suffered to stand.

But though, from the extensive view of the subject which is contained in the case I have cited, it is unnecessary to go at large into the authorities which are there so fully canvassed, yet, in consequence of what fell from your Lordship on a former occasion (*a*), it becomes my duty to advert somewhat more particularly to the case cited from *Freeman*. That case, from the circumstances on which it stands, must, I hold, be taken to be the law on the subject. It is now more than a century old, and it has never yet been called in question; yet your Lordship is required to overturn it entirely, for such must be the effect of the present decree, if now confirmed; that case being even less strong than this in favour of charity. There it is said, "if a man deviseth to *such* charitable uses as he shall direct, &c.;" a word much more immediately pointing at certain specific objects than the word "some" employed by this testator. And then it says, "if the will itself points out *any* particular charity, then the Court ought not to direct it to any other purpose than such as is pointed out by the will (*b*)." Now, if the decree at the Rolls is to stand, I repeat that all this must be rased entirely out of the books; for no part of what I have cited is law, if it be not equally applicable to the case now before your Lordship.

[Sir *Arthur Pigott* then referred to the cases in which the Court has decreed a performance *cy près* (*c*),

(*a*) See ante, p. 58, 59.

(*b*) See the statement of this case, ante, p. 59, note.

(*c*) *Attorney General* v. *Guise*, 2 Vern. 266, &c.

1815.

MILLS v. FARMER.

and mentioned that of *The Attorney General* v. *Hickman* (a).]

It is said, however, that the case in *Freeman*, and that of Mr. *Syderfin's* will, to which it refers, have been shaken by *Wheeler* v. *Sheer* (b). But there is in that case this peculiarity, which takes it entirely out of the principle of the others, upon which I contend that the present also is to be decided. In that case, the testator by his codicil, referring to his will, so far revokes that will, as that he gives his residue "to such uses and purposes" as he shall thereafter direct, not specifying *charitable* purposes; and consequently there was no such general intention to devote to *charity* as this Court can alone act upon in similar cases.

(a) 2 Eq. Ab. 193. pl. 14. Bridgman's Char. Uses, 476.

(b) Mosely, 288, 301. et vide *White* v. *White*, 1 Bro. 12. p. 15. where the case is referred to by Lord *Thurlow*. A testator, after giving several legacies, gave to his executors the residue of his estate upon trust that they should employ it to such charitable uses as by codicil he should appoint. By a codicil to his will, he revoked some legacies and gave others, but named no charitable purposes, and goes on to direct that the residue given by his will should be applied to such uses and purposes as by any other codicil or codicils should be directed. He afterwards made a second codicil, still referring to the bequest in his will, but naming no charitable purposes; and finally a third, containing no direction as to his personal estate whatever; and died soon after. The *Lord Chancellor King* held, that "where a man devises to such charitable uses *as he had appointed*, that supposes he had made an appointment, though it is not to be found: but here it was plain the testator had made no appointment, and only had it in his thoughts to do so."

The case of *Cook* v. *Duckenfield* (a) seems to me another strong authority in support of the principle contended for. The personal estate in that case was devoted to charity, and certain objects specified, with reference to which a scheme was directed to be laid before the Master. But there was also a devise of real estate, as to which no objects were pointed out, but such charitable purposes as the testator should thereafter appoint, and, for default of appointment by the testator, then as his trustees should judge convenient; Lord *Hardwicke*, nevertheless, collected the charitable purpose as applicable equally to the real estate so devised, observing that all the objections arising from want of objects, were easily removed upon construing the testator's intention to be in favour of charity, and he accordingly directed a scheme to be laid before the Master for such charitable purposes as should best answer the intention of the testator, and for the application of the personal, and of the produce arising from sale of the real estate, to such purposes. And this case, also, is so much stronger than the present, as it goes to disinherit an heir at law, an object which the Court in all cases expresses the greatest reluctance to assist in effecting.

With regard to the circumstance of there being no trustee in the present case, no person named by the testator for the express purpose of carrying his charitable intention into effect, if any argument whatever could be raised upon that deficiency, it is completely answered by the decision in the case of *Moggridge* v. *Thackwell*. For where can be the distinction between no trustee being appointed, and the trustee who is appointed dying in the testator's lifetime, by which, in

(a) 2 Atk. 562, 567.

1815.
MILLS v. FARMER.

general cases, the intention would be equally frustrated? If a person is named executor, who dies in the life of the testator, it is the same thing as if no executor had been named.

Then is it possible to maintain that the next of kin, if they are not to take the whole, are to take any part of this residue? The whole property is effectually vested in the executors; and can it be said that, as to one third of it, the testator has died intestate? The effect of this would be to strike out of the books every authority that has been cited. It would be to say that, since the testator had expressly pointed out two objects of his charitable intention, those indeed could not be got rid of; but that, having expressed, but omitted to name, some other charitable purposes, this the Court will consider as void for uncertainty; when, at the same time, if the testator had given the whole residue to charitable purposes in general, without naming any, it would be impossible that the next of kin could come in for any part of it.

I repeat, therefore, that in affirming this decree, your Lordship will do nothing less than blot out at once one half of the law upon the subject. The cases sufficiently shew what that law is.—Possibly it may be better that the law should not remain as it is; it may be more beneficial to the public, in such cases as the present, to strike out the bequest altogether and let the relations of the testator have the property. This is a point of opinion on which I do not presume to be able to form any judgment; neither is this the place for arguing it, nor has this Court, in any shape, the power of acting upon it. All your Lordship has to do, is to ascertain what the law is, as founded on a series of judicial decisions, and to make the decree in this case conformable

to it. It is established that, in favour of charity, the Court will invariably protect the general intention of a testator; and it can no more step out of the line of its duty in this instance, than it can strike out of a will any specific legacy, however clearly expressed and directly given. All that I entreat of the Court is to preserve, in this instance, the uniformity of judicial decisions; if it does otherwise, it will introduce the greatest evil that can arise in any system of judicature.

*For the next of kin.*

Nothing can be more undeniable than that it is extremely important to adhere to principles which have been long established and have stood through a series of concurrent decisions; nor than that, in the course of justice, property is not secure if the law is floating and uncertain in its determinations respecting it. But if, in support of the first point, your Lordship's attention has been drawn to two or three decisions which militate strongly against the very principle which it is endeavoured to establish; and if, with regard to the second, I can shew that not a single former decision applies immediately to the case now before us; I trust that the present case may safely be permitted to rest upon its own merits, without the apprehension of disturbing the established doctrines of the Court by any decision which may appear most conformable to its actual circumstances. So far, indeed, from the danger which is apprehended of unsettling established principles by the decision in this instance, many of the cases which have been cited as establishing those principles are wholly unsatisfactory in their results and at variance with each other and with themselves on the very points which, it is feared, may be shaken by calling them in question. But it is enough for me if, without questioning any, I

1815.

Mills v. Farmer.

can prove, as I undertake to prove, that the present is essentially different from them all.

The principles upon which the Court acts in cases of gifts to charitable purposes are not different from those which govern it in the execution of gifts to individuals. In both the intention of the testator is the only guide; and the Court will not step out of its jurisdiction to create a bequest where none exists, merely because something is said by a testator respecting charity, any more than it will give a specific sum to an individual merely because that individual is mentioned in the will. All that the Court does is this. If the testator has named specific objects of his charitable intention, it will so construe the will as to make it applicable to those objects. If none are named, but the testator has expressed a general intention to devote his property to some charitable purpose, it will give effect to that intention by applying it to some charitable purpose accordingly; and this can only be done by rendering specific that which the testator has announced to be his general object. In both cases, the intention clearly expressed by the testator is that alone which the Court takes upon itself to execute. But what can the Court do in a case where the intention is not so expressed as that it can be with any certainty inferred what that intention was? The Court will not step aside to supply the defect of intention any more in the case of a charity than in that of an individual. The only question for the Court, in the one case as in the other, is whether it is so expressed as to be certain. If not, there is no rule upon which the Court can act, and the property is consequently undisposed of.

It is an error to say that this case was not fully argued in the Court below, or that it was but slightly

considered by the learned Judge who decided it. On the contrary, all the circumstances of the case were properly brought before him, and no man can doubt the power of his mind in applying to those circumstances the acknowledged rules and principles by which his decision was guided. If it be said that all the authorities were not gone into, which have now been cited, it may be answered that all those authorities were already familiar to the mind of that learned Judge; but it is enough that this is not a case to be decided by precedent; it is one with which authority has very little or nothing to do. It is a mere question of intention; that intention is to be collected only from the expressions made use of; and the learned judge, in applying the force of his understanding to the import of those expressions, was forced to come to the conclusion that they did not enable him to discover any intention so certain as to be capable of being carried into effect. If the Court can find such an intention, it is the duty of the Court to execute it; otherwise, while it professes to act upon what does not in fact exist, it is its own will which the Court carries into execution, and not that of the testator.

The language from which this intention is, if possible, to be collected, lies in a very narrow compass. The testator in substance says, I mean to divide my residue between certain purposes which I name, and certain others which I intend to name, after all my worldly property is disposed of to the best advantage. My intention is altogether dependent on the amount of my substance, which I have not yet ascertained. When I have ascertained it, I will then determine in what manner I will have it distributed. That time never came. Probably, the testator died before he was enabled, by disposing of his property, to ascertain the

1815.
Mills v. Farmer.

fact of its value, with reference to which the distribution intended to be made was postponed. How then can these expressions enable the Court to find an intention when, on the contrary, their evident import is that the testator could himself form no intention until an event should take place which never did take place? But it is said, the testator has expressed his intention to give to charity in general. Has he done so? On the contrary, the expressions in this will are just sufficient to shew that he had no such intention. General intention to give to charity, and an intention to give to certain specific objects of charity, are two different and inconsistent intentions. In the one case the testator says, I leave it to the Court to appoint; in the other, he has himself appointed; and if the testator's appointment cannot take effect, the Court has no right to substitute another.

But again it is said, "here are some objects named: and, the others not being named, the former shall take the whole." Still, taking the testator's intention for our guide, who shall say that this is the mode of effecting the intention? who shall say that, on the contrary, by giving to some certain objects named, and to certain other objects to be named, he has not expressly declared that his intention is *not* to give to the objects named, and to those only? Then comes the uncertainty as to what was his intention. It was not his intention to give to charity generally. It was not his intention to give to the objects which he has named only. It was his intention to give something to those objects, and the rest to some other objects. What was that something which he meant to give to the former? The residue is to be divided. The testator has not divided it. Is the Court to divide it? Then, according to what rule of proportion? The testator has left none to guide it. What authority has the Court to establish one?

Then, as to the case put of a bequest to individuals; if I give, "to *A.* and *B.* and such other persons as I shall hereafter name," and afterwards make a codicil, naming no person at all, can the Court say, in such case, that *A.* and *B.* shall take the whole? Certainly not; for the testator has expressly directed the contrary. He has mentioned *A.* and *B.* as persons intended by him to be made partakers of his bounty, but to what extent he has not mentioned. How can the Court assign it? In this case, the words are so loose, indeed, that it may be considered as two objects, or it may be considered as a single object, that the testator has marked out to participate in his intended bounty. But that circumstance, though it would create considerable embarrassment in the mode of distribution, supposing it were practicable for the Court to decree a distribution at all, need not at present be made the foundation of any argument. The only question here is, can the Court take upon itself to say that what the testator has left uncertain is, in its nature, certain?

*The Lord* CHANCELLOR.

Is there any decision to warrant the Court in saying that, if a testator gives to three *individuals*, *A.*, *B.*, and *C.*, in such proportions as he shall afterwards appoint, and afterwards makes no appointment, those individuals cannot take at all; but that, if he gives to three specified *charities* in such proportions as he shall after appoint, and makes no appointment, those charities shall take, the Court taking upon itself to supply the defect of appointment as to the proportions? After a long series of decisions, testators are supposed, in the eye of the law, to know the rules by which Courts are guided in their administration of the law, as well in the cases of charities as in those of individuals. The

1815.

Mills
v.
Farmer.

question is not so much what was the intention, as what, in the contemplation of law, must be presumed to have been the intention. In the present case, whatever may be my decision, I might have decided otherwise if I had not been bound by former decisions; but those former decisions being before me, I must decide according to them. There is the case in *Freeman* (a). I will allow that no other case goes the same length. In *Moggridge* v. *Thackwell* (b), I have recorded all that can be got together on the subject; and I have there stated that the authority of *Freeman* is not absolutely confirmed by any other decision. Still there is that authority. Then there is the case of *Mr. Syderfin's will* (c), which could never have been so decided as it was, if it had not been the case of charity. There the testator referred to a note in writing, by which he had already directed the uses: the testator left no such writing; yet it was said, if the testator has given this to charity, all that remains is as to the mode in which it is to be applied. This could not have been said if the case had been that of an individual and not that of charity: but, being the case of charity, it was so said, and the Court decided accordingly.

*For the next of kin.*

As to that which is cited from *Freeman*, it is indeed called a case, but I cannot see why. In terms it purports to be nothing more than the note of something that passed in Court. "It was *said*."—Upon what occasion was it *said?* It does not appear that it was by way of decision. Nay, by whom was it *said?* It

(a) Ante, p. 59. &c.
(b) 7 Ves. 36. See p. 67,
(c) Ub. sup.

does not appear that it was a *dictum* of the Court. "It was said, *and not denied.*" Therefore, it was *not* said by the Court; for, if said by the Court, nobody could have denied it, and to say "it was not denied" would have been altogether superfluous. It was said, then, by some of the Counsel. And how? It might have been said in the way of argument, and not thought material, so that nobody would take the trouble of denying it. It might have been said, in a looser way still, merely as matter of conversation at the Bar. Then indeed the Reporter goes on to say, "and so it was held in the case of Mr. *Sidrofen*'s will," which case, it is supposed, can mean no other than that of "*The Attorney General* v. *Syderfin*," upon which your Lordship has just commented. But was it, in truth, "so held" in the case of "*The Attorney General* v. *Syderfin*?" Does the decision on that case really bear out the alleged *dictum* in *Freeman*? On the contrary, so far from its being held in the case of "*The Attorney General* v. *Syderfin*" that "if a man deviseth a sum of money to such charitable uses *as he shall direct*, and afterwards leaves no direction, the Court hath power to dispose of it," which is the position laid down in *Freeman*, the decision in that case was founded on a direction said by the trustees to have been already given, but which was not to be found; and the material distinction between the two is that in the case supposed by *Freeman*, the intention expressed is imperfect, requiring a future act to complete it; whereas, in the real case of *Syderfin*'s will, the intention was complete, although it accidentally happened that it could not afterwards be ascertained what was that intention which the testator referred to as already perfected. In that case, the reasoning of the Court must have been this. The testator has given to charity. That gift to charity was rendered perfect by him in his

1815.
MILLS
v.
FARMER.

lifetime. There is no evidence of his having revoked that gift to charity. By giving it to the testator's relations instead of charity, what would the Court do, in effect, but make a will for the testator which there is not the smallest proof that the testator ever had it in his contemplation to make for himself. In the supposed case, on the contrary, the testator has not given to charity; he has only expressed an intention of giving to some charitable purposes, which intention he never carries into effect. It is not a will; it is an expression of intention to make a will. Can the Court carry that intention into effect, and make a will for the testator? The Court can do so no more in this case than in the other; and so, the case of *Sydcrfin*'s will, so far from authorizing the *dictum* in *Freeman*, becomes a direct authority against it.

*The Lord* CHANCELLOR.

I have stated that the original papers in *Syderfin*'s case came into my hands; and it appears by them that that was a charge upon real estates of £1000 for such charitable uses as the devisor had by a paper directed (*a*). Now I take it to be exceedingly clear that, if a man were by will to charge his real estates with a sum of £1000 for such *persons* as he had named in the paper already written, and after his death no such paper were found in existence, no person could claim the sum of money so charged. But *Syderfin*'s case is the law; and by that case it is held that a sum of money so charged for *charitable purposes* is effectually given to the general purposes of charity.

(*a*) Vide 7 Ves. 71.

*For the next of kin.*

1815.

MILLS *v.* FARMER.

I certainly conceive that what your Lordship has stated is a principle which no Court of Justice is now at liberty to call in question; and I will observe only that at least so much violence is put upon common construction by the case establishing that principle that I may securely call upon your Lordship not to do still greater violence by extending the principle.

That case, however, does not apply to the present; for here is no intention, so expressed as that the Court is enabled to set upon it, to give to any charities except the charities specified. And the circumstance of there being these specified charities occasions a difficulty of a nature altogether different from what occurs in any of the cases cited as governing this. Those cases go only to this, that where no charities are specified, but a general intention to give to charity manifested, the Court will give effect to that general intention. But here the intention is to give something o certain specified charities. The Court, therefore, has no right to treat it as a gift to charity in general; but must, if it gives to charity at all, give *that something* to the charities specified. Nor is that *something* to be *any thing* that the Court pleases to give. If given at all, it must be the specific *something* intended by the testator. The question is, what is that *something* which the testator intended and which alone the Court has power to give. And the answer to that question is that it is no where to be found,—that it is altogether uncertain,—what it is that the testator intended to give. Then it comes to this; can the Court render *certain* that which the testator has left *uncertain?* In other words, can the Court make a will for the testator? The *dictum* in *Freeman*, allowing it to be correct,

1815.

MILLS v. FARMER.

does not apply to this case, because *there* no purposes are supposed to be specified. The case of *The Attorney General* v. *Syderfin* does not apply to this, because *there* the intention had been already perfected. In all the cases cited, the intention, such as it was, was already a perfect intention; and that is the circumstance which renders the present different from them all. Where the Court has acted upon an intention to give to charity generally, it is because it has found, or thinks it has found, that *general* but *perfect* intention. Where it has decreed a performance *cy près*, it is because the testator has in like manner manifested a *perfect* intention, although, that intention being specific and incapable of being carried specifically into effect, the Court has imagined that it is more nearly executed by finding a purpose bearing some affinity to that which the testator himself has pointed out than by letting the property go as it would have gone if no disposition whatever had been attempted to be made of it.

The case of *Moggridge* v. *Thackwell* is a case in which the intention is perfected. It is the case of an absolute gift to a person who is also the testatrix's executor, to be disposed of in charity as he shall think fit. The person so named executor having died, the Court considers that the trust which he has become incapable of executing has devolved on itself, and decrees a distribution accordingly.

In the case of *Sir William Guise* (a), in that of the bequest to a Jewish synagogue (b), and others of that class of cases, there was a plain and perfect intention

(a) *Attorney General* v. *Guise*, 2 Vern. 266.

(b) *Da Costa* v. *Depaz*, Amb. 228.

to exclude the next of kin; and, though that intention could not be executed *sub modo*, yet the Court thought the next of kin to be so absolutely excluded as to make it necessary to find such other object as would approach most nearly to the intention and be at the same time capable of being effectuated, for the Court to act upon.

In this case there is no perfected intention. It is nothing more than the expression of an intention to be rendered complete at some future time upon the testator's having ascertained the amount of his property. If his intention was, after that time had arrived, to give it, not to general but to particular charities, the Court would violate, not give effect to, his intention by acting as if that intention had been to give to general charities and not to particular.

The case of *Wheeler* v. *Sheer* (a) must not, however, be left unnoticed. That case was decided not long after *The Attorney General* v. *Syderfin* and twenty-eight years at least after the date of the saying reported by *Freeman*. It is this. All the rest and residue of my estate I give to my executors in trust, &c. This they shall dispose of to such charitable uses *as by codicil I shall appoint*. Now it happens, singularly enough, that this is the identical case *supposed* by *Freeman*, and as to which he informs us that "it was said and not denied" that the Court had power to dispose of the gift to charity. Whoever said it, it seems that the *Lord Chancellor King* did not hold himself bound by the saying, for he decided the case of *Wheeler* v. *Sheer* in direct opposition to it.

(a) Ante, p. 72.

1815.

MILLS
v.
FARMER.

*The Lord* CHANCELLOR.

The reporter of that case of *Wheeler* v. *Sheer* does not state the grounds upon which the *Lord Chancellor King* decided it against the charitable intention of the testator. But, from the statement of the circumstances in that case, I should imagine it was considered that the codicil operated as a revocation, and that, by the direction in the codicil that the residue should be applied to "*such uses and purposes*" as he should thereafter appoint, the testator had abrogated the "*charitable* uses and purposes" expressed by his will. Subsequent cases have proceeded upon this principle, which clearly is law.

*For the next of kin.*

As far as the grounds of Lord *King*'s decision can be inferred from the short note of his words in *Mosely*, this of a revocation by the codicil was not one of them; yet, if it had been so, it could scarcely have escaped the notice of the Reporter, according to whom the reason given was that "here it is plain the testator had made no appointment, and only had it in his thoughts to do so," adding, that "by the codicil he *confirms* the will," not *revokes* it (*a*).

Sir *Arthur Pigott*, in reply.

The difference between the case of individuals and

(*a*) The words are, "by "the codicil he confirms his "will, and makes the trust of "the surplus more extensive. "It was to be in trust for a "charity *if* he directed any." Mos. ub. sup.

that of charities is founded on a principle which has been established ever since the statute of charitable uses passed in the reign of *Elizabeth* and has been constantly acted upon from those days to the present. It is not competent to his Majesty's Attorney General to renounce the benefit of any one in that long chain of decisions by which it has been recognised. It is in vain that they may be represented as unreasonable or injurious. Whatever they may have been in their origin, they now form a part of the law of the land, and that law must be administered according to the effect of them. The arguments which have been addressed to your Lordship in that view of the case which the other side is bound to take are not new nor of recent discovery. They have uniformly been addressed to the Court in all cases involving the same principle, and have uniformly failed of producing the effect intended.

The attempt made to throw discredit on the note in *Freeman* may perhaps be an exception to this remark. Yet that note, if fairly considered, must be inferred to relate to a decided case; otherwise it is very difficult to imagine how it could find admission into a book of generally acknowledged authority; still more, how it should come to have been treated as an authority in itself in so great a variety of cases from its own time down to the present, many of which are of a date immediately succeeding, or but a little posterior to it.

But, to leave the cases and consider this only upon general principle, as applied to the particular circumstances; I say, this case is one in which the testator's intention is perfect and requires no further act to its completion, that intention being to devote his residuary

1815.

MILLS *v.* FARMER.

property to charity. How is that intention recalled or annulled by specifying certain objects to which it was then directed? True, he might at the time have contemplated the directing it also to others. But, because he had at the time a purpose of making some further declaration respecting his property, and did not do so, must the case therefore be treated as if he had made no declaration at all? Can it be seriously pretended that the Court does not much more stand in the place of the testator and make a will for him, when by itself it declares the specific objects of a general charitable intention, than it would do in carrying into effect a general charitable intention by applying it to objects which the testator himself has marked out as being, at least in part, those to which he designed that it should be so applied? In all cases the Court proceeds upon the principle of giving effect to intention. How can it act upon that principle in a case like that of *Syderfin*'s will, where it has no guide whatever to direct it in the specific application or to discover any one object of charity peculiarly favoured by the testator, and refuse to act upon it in this case, where the testator, by naming two specific objects, has left no doubt as to his inclination towards them, whatever may be the uncertainty apprehended with regard to the extent to which he meant to indulge it?

The truth is that all these cases have their difficulties, and difficulties so great that, if this were a new question to be argued before your Lordship, the result might, at least, be extremely doubtful. But the question is, not whether there is more or less difficulty in this or in that particular case, but, what is the principle to be drawn from all the cases? and then there is not the smallest ground for imagining that the pre-

sent does not fall within that principle. In *Moggridge* v. *Thackwell*, where the testator's bounty is directed to such purposes as a certain person, whom he appoints his executor, shall name, how can it be pretended that his intention is executed by directing it to such purposes as the Court may think proper to name? Yet the Court finds itself authorized to name them, saying, it is the general, not the specific, charitable purpose that we take upon ourselves to execute. The general purpose is demonstrated; what remains is only the mode of carrying it into effect, and that we are empowered to supply.

Such being the principle of construction established by the cases, the Court has no more the power of departing from it than it has, strictly speaking, the power of making a will for the testator. But the Court takes it for granted that the testator is acquainted with this principle; and the law therefore supposing him to be so informed when he made his will, even though *in fact* he may have made it *inops consilii*, yet, in the contemplation of law, his will is that that principle shall be applied to his particular case, and consequently the Court, in acting upon that principle, executes the testator's will. So, in construing certain expressions in a will to create an estate tail, the Court acts upon the presumption that the testator knew those expressions to have that legal effect; and, supposing he knew it, then it is no arbitrary rule of the Court, but the true and genuine will of the testator, of which it decrees the performance.

But the difficulty in this case lies in the proportions to be assigned to the different objects specified. Suppose I give to three specific charities in such proportions as I shall hereafter name, and never name any;

1815.
MILLS
v.
FARMER.

this case would comprise the whole difficulty which is apprehended to exist in the present; it might be said in that, just as in this, who can tell whether the testator meant to give to either of these charities in particular, the tenth, or the fiftieth, or the hundredth part of that which he has given to all of them collectively? Yet I think I may venture, without much hazard of contradiction, to say what the Court would decide in that case; namely, that each of the three charities should take an equal third of the legacy.

But, it is then said, the present case involves another difficulty. The disposition is not intended to be complete until after a particular event shall have happened; that is, "after all the testator's worldly property is disposed of to the best advantage."

*The* LORD CHANCELLOR.

The testator means no more, by that clause, than to direct his property to be disposed of to the best advantage. It has no reference to the bequest of the residue, and is the same as if it stood before, instead of coming after it.

*For the Attorney General.*

After all, the only real difficulty in this case is that which would arise from the mode in which it is contended on the other side that it ought to be considered. If this residuary clause were to be viewed as the mere indication of an intention hereafter to be perfected, what possible end could be answered by its introduction at all? Supposing the testator had meant it should fail altogether if he did not afterwards confirm it by naming some additional objects, why not wait till he

had made up his mind as to all the objects before he named any? His only motive for doing so must have been this. Although he had not made up his mind as to all the objects he had in contemplation, he had made up his mind upon the general intention and also upon some of those objects; and, rather than that intention should fail altogether by any unforeseen accident which might happen, he thought fit to signify in the first instance what that was, leaving it to futurity to add such other purposes as he might in future embody.

Then it is said, the case of *Wheeler* v. *Sheer* has over-ruled the former decision reported by *Freeman*. This was not so understood, however, by *Lord Thurlow* who says, on the contrary (*a*), "In *Wheeler* v. *Sheer*, in *Lord King*'s time, there was no appointment, but the testator had procrastinated the legacy; that evidence satisfied *Lord King* that the testator had not so fixed his mind as to separate the legacy from the personal fund, and he would not carry the charity into execution."

*The Lord* CHANCELLOR,

In deciding *Moggridge* and *Thackwell*, I took occasion to look into the case of *Wheeler* v. *Sheer*, and examined it with great anxiety; and, after all the attention I have given to it, my notion is this; that, if that case had stood upon the will only, it would have fairly raised the question whether the note in *Freeman* is law: but the circumstance of the codicil made afterwards naming purposes in general, and not charitable purposes as had been done by the will, alters the case in a point so essential as to render it of no authority in

(*a*) In *White* v. *White*, 1 Bro. 15.

deciding the question at issue; and my opinion is that the case must therefore have been decided upon the principle that the first intention expressed by the testator was over-ruled by his second intention, and consequently, that the rule of law applicable to cases of charity had there no place.

In speaking of the book in which this case of *Wheeler* v. *Sheer* is to be found, I wish to make one other observation. That book has been brought into some disrepute by a saying of *Lord Mansfield*'s, that no man should cite *Mosely*. I myself think very differently from *Lord Mansfield* on that subject, having always considered *Mosely*'s Reports as a book possessing a very considerable degree of accuracy.

*For the next of kin.*

And yet, if *Mosely*'s authority is of any weight with respect to the grounds of *Lord King*'s decision in that case, those grounds were very different from that now stated by your Lordship.

*For the Attorney General.*

It is true that the whole question in this case depends entirely on the construction of these few words, "And other charitable purposes as I do intend to name hereafter;" but those words are to be construed according to the established rules of the Court. You cannot substitute any other interpretation in the room of this principle. Here is an absolute gift to charitable purposes. That those purposes are to be named hereafter operates only as to the mode; it does not affect the gift itself. Even as to the mode certain directions are given which, in the absence of the further directions

proposed, may stand as the expression of the testator's whole will respecting his residue, but which must be struck out altogether if the general intention is not to have effect. That no decided case is the same, in its precise terms, with the present, may be perfectly true; but it is no less true that the principle which governs this is the same which pervades all the cases; and, if your Lordship decides according to that principle, it is impossible that the decree made by the *Master* of the *Rolls* can stand.

*The Lord* CHANCELLOR,

When this cause first came before me to be reheard, I cannot help saying that I felt a considerable degree of doubt attaching itself to a subject on which the *Master* of the *Rolls* does not seem to have entertained any; and, while the great weight of authority which belongs to every decision of that learned Judge rendered me more than usually anxious to be certain of fully comprehending every principle upon which his judgment in this instance could have been founded, I experienced some satisfaction from the information that he had not had the previous advantage of so full a discussion at the bar, especially on the part of the *Attorney General*, as the great importance of the subject appeared to demand. It was with this view that I desired to be made more particularly acquainted with the nature of the arguments submitted to his honour and the precise grounds upon which his judgment was given; and the result of that enquiry was, that, finding my mind still assailed by scruples respecting the sufficiency of those grounds to warrant the decision, I directed the second argument which we have heard to day. After hearing

1815.

Mills v. Farmer.

that argument, I cannot by any means bring myself to the conclusion of affirming his honour's decree. I wish that the cause had been re-heard before him, at least in the first instance; and I feel that, in differing, in case I should find myself bound to differ, from so great a Judge, my own decision will not hereafter possess all the authority which might otherwise attach to it. In order to give it more force, I have thought it my duty, in the first place, to hear all that, if the *Master* of the *Rolls* had heard it, might have induced him to form a different opinion; and I shall now take further time, to give all that has been alleged its full power over my mind, before I pronounce my judgment.

I am fully satisfied as to all the principles which have been laid down in the course of this argument, and accede to them all. There is no question, that the Court has not the power to make a will for the testator, but only to carry into execution that which he has made himself; and this it can do only by giving to it such a construction as former precedents have established to be the right construction in every particular instance. Neither is there any doubt that the same words in a will, when applied to the case of individuals, may require a very different rule of construction from that which would govern them if applied to the case of charity. If I give my property to such person as I shall hereafter name to be my executor, and afterwards appoint no executor; or if, having appointed an executor, he dies in my lifetime and I appoint no other to supply his place, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But, to give effect to a bequest in favour of charity, the Court will, in both instances, supply the place of an executor and carry

into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the ordinary's province to distribute, in case of intestacy. A third principle, which it is now too late to call in question, is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode which alone was left deficient.

The doctrine laid down by *Freeman* has never, to my recollection, been judicially contradicted. On the decision in the *Attorney General* v. *Syderfin* I can most confidently rely, from the circumstance already adverted to, of having inspected the original papers, which I examined with the most minute attention. It was there held that the will had expressed a complete intention, capable of being executed, notwithstanding the loss of the writing to which it referred as containing the mode by which it was meant to be executed. This case, therefore, establishes in the strongest manner the distinction before laid down; because, in the case of individuals, nobody can doubt that a will, under such circumstances, would have been incapable of being carried into effect. It was said in that case that it must be presumed the writing had been in existence and was lost by accident. But nothing can be more certain than that, in the case of individuals, no such presumption could have been available to establish the will, because, in that case, in the absence of the in-

1815.
MILLS
v.
FARMER.

strument declaring the purposes, there were no purposes in existence to which the will could have any application; and it must, therefore, have failed altogether.

Again, in the case of an individual, if I leave my estate to such person as my executor shall name, and appoint no executor, or, having appointed one, he dies, and I neglect to supply his place with another; it is admitted that the bequest so given amounts to nothing. Yet it cannot be denied that such a bequest to charity would indicate that general charitable intention which, according to the rules of law, is sufficient to give it effect; and that the Court, in such a case, would assume the office of the executor.

It is admitted, indeed, for the next of kin, that a charitable intention so expressed is complete, because the testator has given, or at least indicated the design to give, the property in question to a certain individual for the express purpose of carrying it into effect; but they say that the case is different where the property is not so disposed of. I cannot allow this distinction. In all these cases it is the intention which the Court looks for; and that intention is as clearly expressed by saying, "I give my property to charitable purposes," as by saying, "I give my property to *A. B.* for charitable purposes." Besides, in this case, although the testator does not expressly mention his executors in the clause bequeathing the residue, he has already named executors in the will; and the direction contained in the residuary clause can be understood only as imperative upon his executors so appointed.

I have already expressed my opinion with respect to the ground of decision in *Wheeler* v. *Sheer;* and it is the same with that which I before gave when discuss-

ing the authority of that case in *Moggridge* v. *Thackwell* (a). There was in that case a codicil declaring uses more extensive than those declared by the will; and amounting, therefore, in my mind to something very much like a revocation of the will in respect of those uses. The circumstances of that case, then, are such as to render it of no weight as an authority to govern such a case as the present. There it was, in effect, "to such charitable *and other* uses as I shall appoint." How is that applicable to a gift "to certain charitable purposes, and to other charitable purposes which I shall name hereafter?" Either the codicil, in *Wheeler* v. *Sheer*, revoked the will; or it operated to include other objects besides those directed by the will; or it must be taken to have been a declaration in writing by the testator that he did not intend that construction of his own will which a Court would put upon it if it were not so guarded. I therefore repeat that, in any view of the case, it is no authority to govern the present.

The question, then, resolves itself into this.

When this testator gave the residue of his property to two charities which he specified, and to such others as he should thereafter specify, did he mean to say, or must he be taken as having meant to say, that this residue should devolve to charity; or did he mean, or must he be taken as having meant, to say this, "Unless I name other charities besides those I have already specified, I do not mean to devote my residue to charity at all"?

That is the true question upon the construction of

(a) 17 Ves. 79.

1815.

MILLS
v.
FARMER.

this will; and the only question. The subsequent words in the clause do not bear upon the point.

*Nov.* 13.

*The Lord* CHANCELLOR, (after stating the will and codicil, and observing on them for the purpose of shewing that there were no circumstances in the case affecting the general principle, proceeded to deliver his opinion upon the residuary clause, as follows.)

The question reduces itself to that which I have before stated to be the only question in this cause, and which is in substance this; Whether, regard being had to the rules applied by Courts of equity for centuries past to cases of privileged testaments, the residue is effectually disposed of by this testator; privileged testaments being such, according to *Swinburne* (*a*), as "have some special freedom or benefit, contrary to the common course of law," and "forasmuch as by a private or special law they are discharged from the usual orders or observations of common or general law, in that respect are called privileged."

In the case of *The Attorney General* v. *Syderfin*, which was a devise of an estate charged with payment of a sum of money in favour of a specific charity which the testator stated to have been already mentioned by him in a certain paper or note in writing, and no such paper to be found, the Court construed the will in such a way as it is perfectly impossible it ever could have been construed if the case had been that of a gift to an individual; for though no evidence, whether admissible or inadmissible, was attempted to be produced of what

(*a*) Part 1, § 13, page 52, 3.

1815.

MILLS v. FARMER.

was become of the paper, the Court held that the will itself was sufficient evidence of the general charitable intention, and decreed accordingly. As is said by *Swinburne*, speaking of testaments found cancelled or defaced, that, in general cases, "the person in whose custody the testament is so found, is to be adjudged to have done the act, whether it be the testator or another. And if it be so that the testament were kept in such a place, as that not only the testator but others might have access unto it, in this case, the arguments and circumstances of the fact being equal and indifferent, the cancelling or defacing of the testament is rather to be ascribed to the testator than to others; who is also presumed to have done the same wittingly and willingly; saving in legacies of freedom, or *ad pias causas*, which being blotted or put forth by the testator, it is not presumed to have been done willingly" (*a*). So, in that case, it was held, in conformity with this doctrine, that, if the note were found to have been cancelled, and it could not be known whether the testator had cancelled it wilfully, the Court would not presume it to have been so wilfully cancelled. It was quite clear, from the will, that the note had once been in existence, and that was enough for the Court to decree a devise in favour of charity.

*Moggridge* v. *Thackwell* was determined entirely by the force of precedents, much against my inclination; inasmuch as the appointment of an individual, in whom alone the testatrix thought proper to repose the confidence which she reposed in *Vaston*, indicated an intention of that peculiar nature which it is impossible to suppose could be in any degree rendered effectual by the Court taking upon itself the administration of a

(*a*) *Swinburne*, Part 7, § 16, p. 515, 16.

1815.
MILLS
v.
FARMER.
*Nov. 7.*

trust, certainly meant to be personally vested in the individual selected. Nevertheless, in that case, I took it to be firmly established, upon the authority of precedents too numerous to be mentioned, that, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy, yet, where the testator has sufficiently denoted that charity is his legatee, the Court will consider charity as the whole substance of the legacy; and, in such cases only, will provide a mode by which that legatee shall take, but by which no other than charitable legatees can take.

In *Moggridge* v. *Thackwell*, the bequest of the residue was, in substance, to such charitable purposes as a certain individual, *Vaston*, should appoint; and that individual died in the lifetime of the testatrix. The effect of that is precisely the same as if she had bequeathed the residue to such charitable purposes as she herself should appoint, and had died without appointing any. In either case, if the gift had been to "such persons," instead of "such charitable purposes," it is evident that it must have failed altogether; and, by establishing it in favour of charity, the Court would not take upon itself to do more in the one case than in the other.

The same principle is applicable to that class of cases in which legacies have been given to superstitious uses. In those also the general charitable intention is held to prevail, and so the benefit, designed by the testator for a particular object, being taken by the Court into its own hands as trustee to carry into effect the general intention, is transferred by it to some other object altogether different from the former. Thus a sum of money, given to found a Jew's synagogue, is

taken by the Court according to that established principle, and transferred to the benefit of the Foundling Hospital.

It is, therefore, no longer to be contended that a disposition in favour of charity can be construed according to the rules which are applicable to individuals. This is the view to be taken of the case mentioned by *Freeman*, that where a testator gives to such charitable uses as he shall direct, and gives no direction, the Court will direct the uses to which it shall be applied. The case of "one *Jones*," which is there referred to, is not now to be found; but, if there is no express decision which has gone precisely the same length with the note in *Freeman*, it may safely be affirmed that neither is there any decision which has determined that the doctrine there laid down is not law; and it has certainly been cited as an authority in almost every case of a gift to charity that has come into question from those days to the present.

Admitting all that *Lord Thurlow* has said with regard to the decision in *Wheeler* v. *Sheer*, it is quite impossible to look into the circumstances of that case, and say that it is a case which at all touches on the doctrine in *Freeman*. If that doctrine be law, the decision of the *Master of the Rolls* on the present case cannot be right. If the law be, that the nomination of the particular objects is only the mode, and the gift to charity the substance, of the testamentary disposition, and that the declaration of such a gift is substantially sufficient to give effect to the disposition; it is surely much less strong to say that, where the testator has himself expressed certain modes by which that effect may be given to it, it shall be carried into execution accordingly, than to say that, because he has expressed

1815.

Mills v. Farmer.

an intention of naming certain other modes in addition to those which he has named, and has not named those others, therefore his intention must fail altogether; than to say (in short) that, because he has contemplated a division in certain proportions which he has omitted to render certain, that uncertainty must operate to prevent his general intention, which is ascertained, from taking effect in any manner whatever. Would this be to decide according to the authority of established precedents? How can uncertainty as to the mode operate to defeat the intention, when the impossibility of a certain mode taking effect at all does not so operate?

In *Moggridge* v. *Thackwell*, the same difficulty occurred as to the proportions. There, the testatrix herself recommended certain purposes, leaving it to her trustee to name others according to his own discretion. It was in the contemplation of that testatrix that other objects should be adopted besides those which she had herself pointed out. Then, how could it be known in what proportions she meant that the objects she had so pointed out should be benefited? Can the word "divide" (a word which does not necessarily imply equality of division,) constitute such a difference between that case and this, as that, because the testator directed his property to be "divided" for the purposes which he had named and those which he intended to name, he must be taken to have meant that his property should not go to those which he has named *unless* he should thereafter name others also? I doubt, even in the case of individual legatees, whether this would be the right construction. A testator says, "I give to *A.* and *B.*, and such other persons as I shall name hereafter." He has therefore designated *A.* and *B.* as particular objects of his bounty; and it would be putting a very forced construction upon his meaning to infer that he

intended to say, "I do not give to *A.* and *B.* *unless* I shall name certain other persons hereafter."

Then, are the next of kin to be substituted in the place of those other charities which the testator intended to name, so as to take, in any, and (if in any) in what, proportions, together with the charities, which he has named? It is evident that this latter question does not arise, supposing the testator to have effectually devoted the whole of his residue to charity; and my construction of his bequest is this: "I give my residue to charitable purposes. At present, I go the length of saying that *A.* and *B.* shall be two of those purposes. I mean to name others hereafter." By not naming others, can it be said that he has restricted the generality of his former absolute gift to charity?

I repeat that I am sorry for it, because I am very unwilling to differ from any opinion pronounced by so great an authority as that of the *Master of the Rolls*; but, in the present case, I find myself driven to say that, in my judgment, this is a bequest to charitable purposes.

It, therefore, follows, that a scheme must be laid before the Master, regard being particularly had to the charitable institutions denoted by the testator; but not so as to confine the bequest to those only.

If the next of kin should think proper to carry the question before the House of Lords; and if, in the further discussion before that tribunal, it shall be found practicable to mark any distinction between this case and those other cases upon the authority of which I have felt it necessary that this be now decided; I shall be glad to assist that distinction to the utmost point

1815.

MILLS v. FARMER.

that it will bear. But I cannot say that I, at present, perceive any such distinction.

The decree, as pronounced by the *Master of the Rolls*, must, then, be reversed. The *Attorney General* and the executors are to present the scheme before the *Master*. All parties to have their costs of this appeal, out of the estate, as between attorney and client.

Decreed accordingly.

*Dec.* 20th.

## WALLINGER *v.* HILBERT.

No reference of title upon a question whether the estate was tithe-free, having been sold as such.

IN this case the Plaintiff filed a bill for the specific performance of an agreement entered into by him with the Defendant for the sale of an estate to the Defendant tithe-free. The Defendant, in his answer, admitted the agreement; but contended that the estate was not tithe-free, relying upon a letter written by the Plaintiff's Solicitor to the Defendant's Solicitor, in which the former admitted that his endeavours to prove the estate tithe free had hitherto been ineffectual.

The Court was moved for a reference to the Master, on the title, and to see whether the estate was tithe free.

*Newland* in support of the motion.

Sir *Samuel Romilly* and *Winthrop* in opposition to it.

*The* LORD CHANCELLOR,

1815.

WALLINGER v. HILBERT.

Held that the question whether the estate was tithe free was not a question of title; and that, in cases of a reference to the Master upon the title, he never looked into that question.

And his Lordship refused the motion. (*a*)

(*a*) See 6 Ves. 679. 17 Ves. 280. and *Stewart* v. *Alliston*, ante, p. 32.

## FOX *v.* BIRCH. (*a*)

*Dec.* 20.

Motion, for a purchaser in possession to pay money into Court, refused, under the circumstances of possession given independently of the agreement to purchase, and *laches* on the part of the vendor in completing his title. See *Burroughs* v. *Oakley*, ante, p. 52.

BY articles of agreement dated the 23d of *June* 1808, the Defendant agreed to become the purchaser of certain estates belonging to the Plaintiff, to which the Plaintiff covenanted to make a good title and deliver an abstract on or before the 12th of *July* following, and, on payment of the purchase money (£100 of which was already laid down by way of deposit) to convey to the Defendant.

The bill stated that the Defendant entered into possession under this agreement, that the abstract was delivered pursuant thereto, and that the title appearing upon such abstract was a good title; praying, therefore, a specific performance, or else that the Defendant might be decreed to give up possession, and account for the rents and profits.

(*a*) *Ex Relatione.*

1815.

Fox
v.
Birch.

The answer admitted the agreement, but said that the Defendant was already in possession under a prior verbal agreement, and that an abstract was delivered on the 10th of *June* 1814, to which the Defendant took objections which had not been removed; that he, the Defendant, had laid out £3000 in erecting a house on land of the Defendant's adjoining the premises so agreed to be purchased, and other buildings upon those very premises, with a view to the occupation of both, by which the possession of those premises was become necessary to him; and that he had reason to believe the Plaintiff could, by using proper diligence, make a good title, although he had hitherto neglected to do so.

Upon the coming in of this answer, the Plaintiff moved that the remainder of the purchase money might be paid into Court.

*Courtenay*, in support of the motion.

*Roupell*, for the Defendant.

*The* Lord Chancellor said, that although, in the ordinary case of a purchaser being let into possession, he must be taken to have waived, or to have given reason to expect that he will waive, objections to the title; yet there is another class of cases in which the purchaser gets into possession by the courtesy of the vendor, where it must depend upon the particular circumstances of each case, whether he shall be compelled to pay in his purchase money before the completion of the title. In the present case, it was not denied that there was a degree of *laches* on the part of the vendor in making out his title; and on these grounds his Lordship thought proper to refuse the motion.

1815.

Fox
*v.*
Birch.

The following order was then drawn up by consent between the parties:

"That it be referred to the Master to inquire and state to the Court, whether the Plaintiff can make a good title to the estate in question in this cause agreed to be purchased by the Defendant; and whether the Plaintiff ever and when delivered, or caused to be delivered, to the Defendant or his Solicitor, an abstract of his title; and whether the same was a perfect abstract, or in any and what respects deficient; and, if deficient, whether the same was afterwards and when perfected. For the better discovery whereof the parties are to produce upon oath all deeds, papers, and writings, in their custody or power relating thereto; and to be examined upon interrogatories as the said Master shall direct."

The question of costs and further directions reserved.

## ADLEY *v.* The WHITSTABLE Company. (*a*)

*Feb.* 8, 1815.

See the report of this case on the hearing, 17 Ves. 315.

AN action having been brought, conformably to the *Lord Chancellor*'s opinion (*b*), to try the validity of the by-law in this case, a case was reserved

(*a*) This case was intended to have been inserted in Mr. *Cooper*'s Reports; but the *Lord Chancellor*'s order not having been procured in time for the publication, the note was communicated to me, and I am now enabled to add to it the order, extracted from the Register's book.

(*b*) 17 Ves. 328.

1815.

ADLEY
*v.*
The WHITSTABLE Company.

for the Court of *King's Bench*, and judgment pronounced for the Plaintiff (a).

The cause came on upon this day for further directions.

Sir *Samuel Romilly* and *Boteler*, for the Plaintiff.

Sir *A. Pigott*, *Hart* and *Bell*, for the Defendants.

*The* LORD CHANCELLOR.

The difficulty arising from the number of parties is not such as to baffle the Court, or deprive it of the means of doing effectual justice. Wherever a legal right exists, there must be also the means of enforcing that right; and, in the present case, if, when the Company thought proper to become a Corporation, they did so without looking at all the consequences, yet they did not the less acquire the right to sue, and liability to be sued, as such Corporation; nor will the Court fail to consider them with all the incidents attaching to that capacity.

The bill alleges that the Plaintiff was a member of, and, as such, entitled to receive his share of the profits of the property belonging to, the Corporation. To this it is answered, first, that the Plaintiff is not so entitled, by reason of the by-law. The Plaintiff replies, that that by-law is illegal. Here the argument was founded on the impropriety of the Plaintiff's being a member of both Companies (b). But the Plaintiff was interested in the *Sea-Salter* Fishery before the

(a) *Adley* v. *Reeves*, 2 Maule and Selw. 53.

(b) See the statement of the case, 17 Ves. 316.

*Whitstable* Company was erected into a Corporation. Can a by-law of the Corporation, then, force him to part with his estate?

The Company next put it thus. Admitting that you are entitled to the profits, still there is no way of getting at them. That is, in other words, we constitute such a Corporation as to be able to say to the individual members (who are the *cestui que trusts* of the Corporation), you are the only *cestui que trusts* in the world who can have no relief against their trustees. The by-law is certainly framed (I do not say, on purpose,) in such a manner as to make it difficult to give relief; directing that the Company shall divide among themselves the profits of the excluded member. But it appears to me, that if no remedy is to be had in equity, it is to be had no where else; and, if the Corporation are trustees of a particular fund, I do not see how they can refuse to be treated as such, and to account in like manner with all other trustees; and, with regard to the difficulty in carrying a decree into execution, it can only be said that the decree must be executed as in other cases of trust property.

But then it is pretended that this Corporation has no property; which raises the question, whether the surplus profits which, after deducting the expenses of labour, are distributable among the individual members, are not Corporation property until they have been so distributed; and it is argued, that so to consider them would be to exclude the widows of freemen, and others, whose interests the Court is most anxious to favour. To this I answer, that the Court can look no farther than to the rights of the parties as individual members of the Corporation, without considering how those in-

1815.

Adley
v.
The Whitstable Company.

terests may be liable to become affected by circumstances over which it can have no controul.

In this case the Defendants must be taken to have admitted profits; and, if the Plaintiff was willing to dredge, but could not on account of the prohibition of the Defendants, he must be considered in equity as having actually dredged so as to entitle him to a participation in them.

Decree an account of profits.

The Master to inquire what property the Corporation has.

I acknowledge the difficulty of the inquiries directed, and which must be equally acknowledged both by the Plaintiff and the Defendants. The Plaintiff, therefore, is to have his costs to this day; but, in case a reasonable compensation should be offered and perversely refused, the Court will know what to do with regard to the costs hereafter to be incurred.

---

In consequence of the intimation thrown out by the *Lord Chancellor* at the close of his judgment, proposals were made for an accommodation; but the parties not agreeing, the following minutes of a decree were drawn up by the Register.

" Decree, that it be referred to the Master to take an account of all the profits and earnings of the Whitstable Oyster Fishery in the pleadings mentioned, accrued since the 3d of *August* 1805, received by the Defendants or by any other person or persons by their

1815.

ADLEY v. The WHITSTABLE Company.

order or for their use. And let the said Master inquire what property the Defendants, the Company of Free-fishers and Dredgers of *Whitstable*, are possessed of." With the usual directions, for better taking the said accounts, &c.

*April* 15.

On this day the Plaintiff moved to vary the minutes, by adding thereto the following words at the commencement.—" Declare, that the Plaintiff is intitled to share in all the profits and earnings of the *Whitstable* Oyster Fishery accrued since the 3d of *August* 1805 as a working freeman;" and by inserting, after the words " or for their use," the words " and to ascertain the Plaintiff's share of such profits and earnings;" and also the words " seised or" before the words " possessed of."

*The Lord* CHANCELLOR.

The circumstance that the parties cannot settle it among themselves must not be suffered to influence judicial proceedings. I did say that the Plaintiff was to be considered as a person who had dredged; by which I meant the same thing as saying that he was to be considered as a working freeman.

I also said that this was as difficult a case as any in equity; but it seemed to me that there must be a remedy somewhere, and if not at law, then of course in equity. There are cases (for instance those of coal mines, &c.) in which the Court gives more than may be actually due, on account of its inability to distinguish; and, in the present case, it is the fault of the Defendants that this difficulty exists. The Court must

1815.

ADLEY
v.
The WHITSTABLE Company.

look at the Plaintiff as entitled, unless the evidence shews the contrary. If I understand the principle upon which I am now proceeding, the relief which I give is not in the nature of damages—it is the share of the profits to which the Plaintiff is actually entitled.

But it is said that he was at the same time a member of the other Company. If, however, it is not made out that he was therefore incapable of dredging at *Whitstable*, I must suppose that he performed that duty in its utmost extent. Then it is said that this would be a great injury to the other members, and that the Plaintiff must make out and establish the amount of his claim. It is contended, on behalf of the Corporation, that it should be open to them to shew that the Plaintiff could not have earned any profits at all during a part of the time that he was excluded. But the difficulty arises from that exclusion. He may say, "True, I was absent; but so long as the bye-law was in force, I was placed by you in such a situation that it was of no consequence where I was." It is needless to say how the question might have turned if the inability shewn had arisen from bad health instead of absence.

The offer made by the Plaintiff was, I think, a fair offer; and I shall not suffer a difficulty to be thrown upon him by the injustice of the Defendants.

---

*The Chancellor* afterwards gave out the minutes himself, and the following order was made accordingly.

*July* 21.

"Order, that the minutes of the decree made on the hearing of this cause on the 8th day of *February*

1815.

ADLEY
*v.*
The WHITSTABLE Company.

last be varied by introducing the following declaration, that is to say, 'Declare that the Plaintiff, having been unduly prevented by the bye-law mentioned in the pleadings from working in any manner as freeman, and from participating in the earnings of the concern, is to be considered, although he did not work, or tender himself or any person for him to work, as a freeman, in taking the account before the Master for his benefit, as *prima facie* entitled to earnings in the most beneficial manner in which, as a freeman, he would have entitled himself to receive or share in earnings; but without prejudice to the Defendants establishing that, at any particular times or periods for which the earnings are claimed by the Plaintiff, in the account to be taken, the Plaintiff could not have entitled himself to earnings, or to earnings as beneficially as he shall claim to be entitled to them in case no such bye-law had been made.'"

1816.

Jan. 15, 16.

## FENWICK and OTHERS *v.* REED, CLAVERING and OTHERS.

Attorney, submitting to produce title-deeds of his client in his possession as the Court shall direct, may be called upon to produce them if the principal could himself have been called upon to do so.

Generally, it is not necessary to make an attorney a party because he has title-deeds in his possession, although it may become so under particular circumstances.

*Quere*, Whether the executor of an attorney can avail himself of the attorney's privilege not to disclose the concerns of his client.

Time, no bar to redemption in case of a *Welch* mortgage, unless twenty years after principal and interest paid by perception of rents and profits.

Length of possession, as a ground for presuming a release, depends on the nature of the possession, whether adverse or not.

CHARLTON (under whom the Plaintiffs claimed) being indebted to *Rooke* in respect of several sums of money, for which *Rooke* had obtained judgments against him, by an agreement in writing, bearing date the 18th of *April*, 1747, made between *Rooke* of the one part, and *Charlton* of the other part, did for himself, his heirs, &c., covenant and agree "to yield up and deliver unto *Rooke* his executors, &c., the possession of all and singular the lands and tenements" therein mentioned, "by delivering possession thereof to *Joshua Douglas*, the attorney of the said *Rooke*, to hold the said lands and tenements to *Rooke*, his executors, &c. as his freehold, until he should have levied and received the amount of his said judgment debts, &c."

In pursuance of this agreement, possession was given as therein mentioned, and *Rooke* entered into receipt of the rents and profits accordingly, and continued in possession till the 13th of *October*, 1752, when, by indenture of assignment of that date, made between *Rooke* of the one part, and *Reed*, who was the ancestor of the Defendant *Reed* and also a creditor by bond and judg-

ment of *Charlton*, of the other part, *Rooke* transferred and set over to *Reed*, his executors, &c. all the said lands and tenements with the rents then in arrear, and assigned to *Reed*, his executors, &c. his said judgments and the remainder of the debts due thereon, appointing *Reed* his attorney to prosecute upon the said judgments.

*Reed* entered into possession by virtue of this assignment, and continued in receipt of the rents and profits till his death, in 1754, after which *Christopher Reed*, (who was residuary devisee, and also executor and residuary legatee under his will), entered and possessed till 1778, when he died, having devised and bequeathed all his real and personal estate to trustees (whom he also appointed executors) in trust for such of his sons as should first attain the age of twenty-four years. After the death of *Christopher Reed*, these trustees and executors possessed the estates in question, and received the rents and profits till 1783, when the Defendant *Reed* having attained twenty-four, was put by them into possession of the same.

In 1767 *Charlton* died intestate, leaving *William Charlton* his son and heir at law, who died in 1797, having devised all his real estates to the Plaintiff *Fenwick* and another, in trust to sell for payment of debts, &c.

The bill filed in 1800 alleged further, that, at the time of *Reed's* taking possession by virtue of the agreement with *Rooke*, it was agreed between *Reed* and *Charlton*, that he, *Reed*, should continue in possession until not only the debts due to *Rooke*, but also until the debts due to himself, should be fully satisfied; and that the whole of those debts for the charge of which the said rents and profits were appropriated, had, by

1816.

FENWICK
v.
REED.

means thereof, been fully paid off; charged that, when the Defendant *Reed* entered into possession, he well knew the estates were held only on mortgage, and, as evidence thereof, that he kept distinct accounts of the rents and profits arising from those estates; that (with respect to the objections which might arise from length of time) *Charlton* could not, according to the agreement, have had possession restored to him till all the debts were paid; that, in the year 1781, a considerable part of those debts remained undischarged; that the Defendant *Reed* had, since he took possession in 1783, given out that part of those debts still remained unsatisfied; that all the debts were specialty debts, and the lands therefore chargeable with them, independently of the agreement; and that *Charlton* and his successors had, through poverty, been unable to pay them otherwise than out of the rents and profits of those estates, or to take measures for recovering possession; therefore praying an account, and that Plaintiffs might be let into possession on payment of what, if any thing, still remained due to the Defendant *Reed* in respect of the aforesaid debts.

Another part of the relief prayed was, the delivery up to the Plaintiffs of all the title deeds and writings relating to the estates in question, the bill having alleged that, upon the execution of the agreement of 1747, the same was, together with various other papers relative to the said transaction between *Charlton* and *Rooke*, deposited in the hands of the aforesaid *Joshua Douglas*, to be by him kept and preserved for the benefit of the parties interested; charging, both with respect to the said agreement, and the deed of assignment of 1752, that if the same were not now in the possession of the Defendant *Reed*, the same, or one of them, or a counterpart or attested copy thereof respec-

tively, or of one of them, together with various other title deeds and papers relating to the said premises and the said transactions between *Rooke* and *Charlton*, were in the custody or power of the other Defendant *Clavering*, as the personal representative of *Joshua Douglas*, with whom the same were so originally deposited, and that *Clavering* ought to deliver up the same to the Plaintiffs, but that Plaintiffs having applied to him for inspection, he, *Clavering*, had positively refused to deliver the same to the Plaintiffs, or to furnish them with any copies thereof, or with a list or schedule, alleging that he so refused at the express instance of the Defendant *Reed*, who had undertaken to indemnify him.

The bill prayed neither discovery nor relief against *Clavering*, other than the delivery up of the title deeds so alleged to be in his possession, if not in the possession of the other Defendant.

To this bill *Reed* put in an answer, denying the circumstances from which it was attempted to be inferred that he, the Defendant, had treated the transaction as a mortgage, and insisting on the length of time from which a release of the freehold ought to be presumed in his favour. He also denied, as to his belief, any agreement between his ancestor and *Charlton* at the time of the former entering into possession, alleging that he so entered merely as a creditor having a right to redeem against *Rooke*. He admitted the assignment of 1752 to be in his possession, but said he had no knowledge of the agreement of 1747 but from the recitals in the deed of assignment; admitting, however, his belief of the agreement as found upon those recitals. He further said, he was unable to set forth whether the deeds or instruments alluded to in the bill

1816.
FENWICK
v.
REED.

with or without any other *title* deeds relating to the said lands or to the said transaction between *Rooke* and *Charlton* were or not delivered to *Douglas*, but that the said deeds were not nor ever were in the custody of him the Defendant, or of any person for his use, except the deed of assignment, and such writings as were in the custody of the Defendant *Clavering*.

The answer stated nothing as to the precise amount of the debts, or value of the premises, but alleged that Defendant believed the debts greatly exceeded the value, and did not admit that they were satisfied up to the present day.

The Defendant *Clavering* said that he was a stranger to the matters in the bill mentioned otherwise than appeared by sundry drafts or copies of deeds, letters, and papers, which came into his possession after the death of his testator, who was the executor of *Douglas*, *and which deeds he, the Defendant, was ready to produce as the Court should direct*, admitting that the same did relate to the matters aforesaid, but that he had not, nor ever had, in his custody or power, to his knowledge, *the deed or instrument* in the said bill alluded to, or *any other deed* relating to the premises; and he submitted whether, inasmuch as the said *Joshua Douglas* was the confidential attorney of *Reed*, by whom the said drafts and papers were delivered to the said *Douglas*, he *Clavering* ought, or not, to set forth a list of such papers, or to leave the same in the hands of his clerk in Court.

The bill was amended in 1801, and again in 1803, and answers duly put in by the Defendant *Reed*, to which no exceptions were taken. In 1807, Plaintiffs moved for leave to file exceptions *nunc pro tunc*, which

was refused, with costs, partly on the merits of the case, and partly on the ground of delay in making the application. In the same year, the Plaintiffs moved for a production and deposit of papers in the possession of the Defendant *Reed*, by which it appeared that *Charlton* was indebted to his ancestor, and also of a certain indenture of assignment admitted to be in his possession; but, the Defendant consenting to produce the assignment, no order was made on that motion. On the 30th of *October* in the same year, the bill was a third time amended, and answer put in, in 1808, since which time no further proceedings appear to have been had in the cause till the present day.

The Plaintiffs now moved, "that the Defendant *Clavering* might leave with his clerk in Court the several drafts or copies of deeds, letters, and papers, relating to the matters in the pleadings mentioned, admitted by his answer to be in his custody, with liberty for the Plaintiffs to inspect the same and take copies, &c."

*Bell*, in support of the motion.

Sir *Samuel Romilly* and *Meggison*, for the Defendant *Clavering*.

*Hart* and *Cooke*, for the Defendant *Reed*.

It was objected, on the part of the Defendant *Clavering*, that the answer upon which this application was grounded had been put in fifteen years ago; that the papers, the production of which were moved for, were not set out in the answer nor by way of schedule, which, it was contended, would be necessary to entitle the Plaintiff

1816.

FENWICK
v.
REED.

to such a production; and that the subsequent proceedings in the cause, already detailed, were of such a nature as ought to furnish a conclusive answer to the present attempt, which could only be made for the purposes of delay and vexation.

It was also contended that the Defendant, of whom this production was required, was the personal representative of the attorney in whose hands the papers had been deposited; and that, although he had submitted to the production, yet the question was, whether he could be bound by such submission. The rule which authorizes an attorney to refuse making a discovery of matters relating to the concerns of his client is not a personal privilege of the attorney which he may waive at pleasure, but a provision of the law for the benefit of the party interested, and therefore not to be dispensed with, except by that party authorizing the disclosure. That, although formerly understood to be otherwise, this was the principle established by the late cases, and not now to be controverted. Then, is the executor of an attorney within the reason of this rule? The rule extends to persons acting in the capacity of clerk, of interpreter, &c.

*The Lord* CHANCELLOR,

Observed that this transaction appeared to be in the nature of a Welch mortgage to which time would be no bar. That, supposing the Plaintiff to have retained his right to redeem against *Reed*, that Defendant, when called upon for a production of papers, could not be admitted to say that the papers were not in his own possession *or power*, they being in fact in the possession of his attorney.

*Bell*, in reply,

1816.
FENWICK *v.* REED.

Contended that it was by no means essential to such an application as the present that the deeds moved for had been set out by way of answer, or in a schedule; that this was not the case of a person having title deeds in his possession as agent of another person, in whose possession or power they may therefore be said to be. The Defendant *Clavering* is not the attorney of *Reed*, nor the attorney's executor, but the executor of the executor, therefore an entire stranger, having papers in his possession, the production of which is necessary to further proceeding in the cause. He had always understood the practice in such a case to be, that the person having such papers in his possession must be made a Co-defendant, charging him with collusion. It is so laid down as to a suit against a corporate body (*a*).

A person who, having no interest, might in general cases demur, is allowed under such circumstances to be made a party for the special purpose. With regard to the refusal of the motion that the Plaintiff might be at liberty to file exceptions, the reason of that was that there was, in this case, no occasion to take exceptions. The Defendant, having submitted to produce, has shewn that his intention was not to rely on the ground of the confidence reposed in him as representative of an attorney. He, therefore, cannot be allowed to set up that objection now.

As to the objection from length of time since the bill filed, it cannot be made by the present Defendants,

(*a*) *Mitf. Eq. Plead.* 152.

1816.

FENWICK v. REED.

they having never thought proper to apply to the Court to dismiss the bill for want of prosecution; nor, if they had done so, would the Court have dismissed it without giving the Plaintiff an opportunity to obtain a production of the title-deeds.

*The Lord* CHANCELLOR.

How far the executor of an attorney can insist on the objection now made by the Defendant *Clavering*, is a question which the present circumstances do not call on me to decide; because he has submitted to produce the papers admitted to be in his possession, if the Court shall direct; and the objection is substantially therefore, not *Clavering*'s, but *Reed*'s. It is said that this is the case of a *Welch* mortgage, where the Defendant has been put in possession for the purpose of repaying himself the money advanced out of the rents and profits of the estate. There length of time is no objection; very different from the case in which a day is fixed for the redemption, where the equity is gone for want of redemption.

This is the first case I recollect in which an attorney has been made a party to such a bill. The practice is certainly quite unusual. There may, notwithstanding, be a special case, in which such a proceeding would be necessary in order that an attorney and his client might not be allowed, by collusion, to fence off a just demand.

It is right that I should look into the bill and answers before I determine whether the present is such a special case.

*The Lord* CHANCELLOR

1816.

FENWICK
*v.*
REED.
*Jan.* 17.

(After stating the case.)

This is a bill for relief, not for discovery only; and therefore the long pendency of the suit does not press so strongly upon the judgment of the Court as it would have done if it had been a mere bill of discovery. The charge in the bill with respect to papers and writings is to this effect; that, if the agreement of 1749 and the assignment of 1752 are not in the possession of *Reed*, the same, or attested copies of the same, are now in the possession of *Clavering* as personal representative of *Douglas*. To this charge the passage in *Clavering*'s answer must be taken, not as a proffer of the papers admitted to be in his hands for inspection, but as a submission to produce them in case the Court should be of opinion that they ought to be produced. I understand from this passage in his answer, that the original instruments of 1747 and 1752 are not in his possession, and it would be a material circumstance if it should turn out that the title-deeds to this estate were never deposited in the hands of *Reed*'s attorney, but remained where they were previous to the transaction.

It does not appear by the bill, that the Plaintiff was aware of the situation in which *Douglas* is stated in *Reed*'s answer to have stood with respect to the parties. He is not mentioned as an attorney, but merely as a third person with whom the deeds are said to have been deposited for safe custody. Generally speaking, and *primâ facie*, it is certainly not necessary to make an attorney a party to a bill seeking a discovery and production of title-deeds, merely because he has them in his custody, because the possession of the attorney is the possession of the client; but cases may arise to

1816.

FENWICK
v.
REED.

render such a proceeding adviseable, as if he withholds the deeds in his possession, and will not deliver them to his client on his applying for them. In the present case, it is from the admissions in *Reed's* answer, that it must be seen whether or not it is right to order the production of these papers by *Clavering*.

Then, what appears, upon those admissions, to be the real origin of this transaction? In the first place, this Defendant finds himself under the necessity of treating it as a case in which length of time and length of possession will not of themselves shut out the claim of the Plaintiffs, but operate so far only as they are circumstances to raise the presumption of a release. In other words, this is the case of a *vivum vadium*, (as it is called, in contradistinction to *mortuam vadiam*,) in which no time is limited for redemption, but the party is left to pay himself the sum for which the estate is pledged out of the rents and profits of the estate. I do not understand that answer to admit the agreement of 1747, as being in the Defendant's possession, but it admits his belief of that agreement, probably founded on the recital in the assignment. The words of the agreement, as stated by the answer, being "to yield up and deliver possession of the premises to *Rooke*, to hold *as his freehold*, until, &c." do not contradict, but rather appear to me to strengthen, the idea that the meaning of the transactions was only to enable the party to pay himself out of the rents and profits of the estate. These words, "as his freehold," are employed by *Lord Coke* in describing the estate by *elegit*—"[illegible] liberum tenementum," as contradistinguished from "liberum tenementum," because *nullum simile est idem* (a). The agreement was that *Rooke* should hold precisely in

(a) *Co. Litt.* 43, *b.*

this manner; and, if the case rested on the agreement with *Rooke*, it is clearly settled that length of time would be no bar to redemption, unless it were proved that the party had held over for the space of twenty years after the debt fully paid and satisfied. That length of time may, under such circumstances, be set up as such a bar in the case of a *Welch* mortgage, as in an ordinary mortgage, has also been determined; and, if the assignment to *Reed* was only till *Rooke*'s debt should have been paid, it is impossible to say that the bar may not be set up in the present case; and, in a future stage of this cause, it may be just to determine accordingly. But, on this point, the answer leaves it doubtful, not only, whether *Reed* took possession under an agreement to pay himself his own debt in addition to *Rooke*'s; but, if he did so, whether the amount of both debts has even yet been satisfied by the perception of rents and profits.

Then, if this is not a case in which length of time alone will operate as a bar to redemption, the question may still remain whether there are circumstances to raise the presumption of a release insisted on by the Defendant? The weight of long continuance of possession as a ground for such presumption must depend most materially on the nature of that possession; and here, again, there is no certainty in the case, as it now stands, whether the possession by *Reed*, after *Rooke*'s debt was paid, was originally an adverse possession, or whether, at first holding by virtue of a distinct agreement with the *Charltons*, his possession became adverse at some period subsequent to his entering under that agreement. In the latter case it would be much more difficult to raise the presumption contended for. These are undoubtedly points fit for future enquiry; and, in

1816.

FENWICK
v.
REED.

the present stage of the cause, as I can entertain no doubt that, if *Reed* in his answer had admitted what *Clavering* has admitted in his, *Reed* must have been compelled to produce the papers in his possession, so I am of opinion that, *Clavering* standing in the situation of *Reed*'s attorney, his admission is substantially the admission of *Reed* himself.

The production required by this notice of motion is, however, too comprehensive in terms; for the Plaintiffs have no right, at present, to any discovery beyond that which is necessary in order to enable them to ascertain the nature of the original transactions.

Take an order, therefore, to produce all drafts and copies of deeds, letters, and papers relating to the original transactions between *Charlton and Rooke*, and between *Rooke and Reed*, or between *Charlton and Reed*, which tend to shew that the parties continued in possession under any agreement to receive the rents and profits in discharge of their debts.

1816.

## *Ex Parte* WHITEHEAD, in the Matter of ALSTON (*a*).

*Jan.* 31.
See before, p. 10.

The original price given for an annuity, with the variation arising from the lapse of time since the grant, is the value to be proved under the act, where there are no peculiar circumstances in the case.

THE LORD CHANCELLOR.—This is a case of considerable importance, as it applies in principle, not only to the value of annuities upon proofs under commissions of bankrupt, but to the administration of assets where annuities are claimed upon insolvent estates. It certainly, therefore, would have been more satisfactory to me, if the question had arisen upon an exception to the Master's report, in order that an appeal might, if expedient, have been preferred, and some general rule been established in the House of Lords.

I must, however, decide upon the petition now before the Court:—and, I have been enabled to obtain so little information from the enquiries which I have made, that I must decide upon the opinion which, after the best consideration that I have given to the subject, I have formed from my view of the intention of the Legislature in directing such debts upon annuity to be proved, and the value to be ascertained by the commissioners. By my enquiries as to the practice in these cases before the commissioners, I have learnt that there is not any settled rule for estimating the value of annuities. Some lists fix a value by the price for which the annuity was purchased, regard being had to the time during which it has been enjoyed:

(*a*) *Ex Relatione.*

1816.

*Ex parte* WHITEHEAD in the Matter of ALSTON.

others consider the original purchase as the value, without any regard to the time of enjoyment; and other lists again consider the redemption price as the proper value. There is, I find, the same uncertainty in the Masters' offices. Some of the Masters regulate their judgment by the estimate of some respectable actuary, without any regard to the original purchase: whilst other Masters take either the original value, or the time of enjoyment, or both, into their consideration.

In the present case, the commissioners have considered the original price, together with half a year's annuity, being the price fixed by the parties for the redemption, as the value of the annuity. I stated, when this petition was argued, and I now think, that this opinion of the commissioners could not be right. To illustrate my meaning, I will suppose that, at the time of the original purchase, the annuity was worth any given sum, say £2500. How can it be of precisely the same value, when six years have elapsed since the original grant? Suppose, again, that one of the three lives upon which this annuity was granted had fallen, could it be said that the annuity was of the same value? These are circumstances to which due consideration must be given: what they may amount to is another thing. The original contract cannot, therefore, be the exact mode by which the value is to be ascertained. The Assignees might, indeed, redeem by the payment of this sum; but this cannot determine the value. Indeed, the parties themselves say it cannot; for they apply to prove upon an annuity which they say is worth £6 or £7000. If it is a fact that this annuity is worth £6 or £7000, I cannot but entertain judicial suspicion that there must have been fraud

1816.

*Ex Parte* WHITEHEAD in the Matter of ALSTON.

and oppression in the original transaction, when scarcely one third of that sum was given for this annuity, and when there are not any peculiar circumstances in this case to raise the value from the time of the grant. And, although the nature of such a contract was not noticed by the commissioners, I conceive that the *Chancellor*, sitting in bankruptcy, is called upon to notice what cannot escape his attention.

That the purchase money is not the fixed value, appears to me to be obvious from considering the difference between the purchase and sale of an annuity: for, if I buy an annuity upon the life of *A.*, I must give perhaps fifteen years' purchase; but, if *A.* grant an annuity upon his own life, he will have difficulty in obtaining more than six years' purchase. Upon the best consideration which I have been able to give to this question, which is of considerable importance, the conclusion at which I have arrived is that, as there are not any peculiar circumstances in this case to affect the price, as it is altered by the effluxion of time, and only by the effluxion of time, I ought to presume that the parties acted fairly at the time when the contract was made; and that the value of the annuity is the original sum given, with the variation occasioned by the lapse of time since the grant. Such must be considered as my opinion, unless I should declare any alteration in my sentiments.

A few days afterwards, his Lordship intimated that his opinion remained unaltered; but that the parties were at liberty to file a bill.

1816.

Feb. 3.

## Lord ABERGAVENNY *v.* POWELL.

Re-examination of a witness, before publication, refused, the application being for liberty to explain and correct his former evidence, and the affidavit being that he had omitted to state a material circumstance(*a*).

MOTION, by *Roupell*, tnat a witness who had been examined on the part of the Plaintiff might be permitted to go before the Commissioners (who were still sitting) to be re-examined, with liberty to explain and correct his former evidence.

This motion was supported by affidavit that the witness was very infirm, nearly eighty years old, and had, a short time previously to his examination, met with an accident, in consequence of which he was fearful that he had misunderstood the purport of some of the questions asked him, and had returned incorrect answers; also, that he did not state a circumstance which had since been brought to his recollection and which he understood to be material in explaining the matters in dispute between the parties.

The examination of this witness had taken place on the 22d of *January*; and, on the 26th, he tendered himself to the Commissioners to be re-examined and explain his former depositions, which they refused to allow.

*The* LORD CHANCELLOR,

Do you recollect any instance of such an application as the present being granted? The cases in which a witness has been allowed to explain an examination

(*a*) See *Beames's* Orders in Chancery, p. 74.

are where publication has already passed in a cause. In the present instance it is impossible for the Court to ascertain whether the alterations intended to be introduced are merely explanatory of the former evidence, or consist of entirely new matter.

*Roupell*, in support of the motion,

Then contended that the proposed re-examination would be open to exceptions on the part of the Defendant, and that it was only sought to obtain the order, saving all just exceptions.

*The* LORD CHANCELLOR.

This application can only be made on general grounds, which would extend to all cases whatever; and the consequence of granting it would be, that similar applications would be made in every cause before the Court. The case is different where a witness applies for liberty to correct his testimony while he is yet present before the Commissioners who have taken it. But if once he is allowed to come again for that purpose after his back is turned, who does not see what latitude would be given to fraud and artful suggestion on the part of those who are interested in the effect of his depositions? If you can produce to me any instance in which this liberty has been granted before publication passed in a cause, you are at liberty to do so. If not, I must refuse this motion, on the ground that I am unable to determine whether the evidence intended to be added is merely explanatory of the former or in itself new evidence. If I make such a precedent, I am fully convinced that there never will be a cause in which it becomes desirable for a party to help out in-

1816.

Lord ABERGAVENNY v. POWELL.

sufficient evidence, that I shall not have the present application renewed.

Motion refused (*a*).

---

Feb. 3.

## TYRREL v. REDIFER.

Answer being referred for impertinence, and reported not impertinent, order, upon motion of course, to refer it to the Master to tax the Defendant's costs.

THE Plaintiff referred the Defendant's answer for impertinence; and, the Master having reported it not impertinent, the Defendant moved, as of course, for a reference to the Master to tax his costs occasioned by the reference for impertinence, and that the Plaintiff may pay the same, when taxed, to the Defendant.

*Agar*, in support of the motion, allowed that, although costs were constantly given to the Plaintiff on a report of impertinence, he had been unable to find any instance in which the converse had been established.

*The Lord* CHANCELLOR.

It would be most unjust, in the one case, to order

(*a*) The application in this case differed from the orders made by Lord *Erskine* in the case of *Kirk* v. *Kirk*, reported in 13 Ves. 280 and 285, those orders being expressly confined to the correction of mistakes in the first examination.

the payment of costs to the Plaintiff; and, in the other, to withhold it from the Defendant.

Ordered accordingly.

## DIXON *v.* ASTLEY.

*Feb.* 1.

Purchaser in possession under an agreement, having exercised acts of ownership, but objecting to the title, ordered to pay in the purchase-money. Slighter acts of ownership sufficient, where they have been committed *since* the discovery of an objection to title.

MOTION, on the part of the Plaintiff, before answer, that the Defendant might be ordered within one month to pay into the *Bank* in the name of the *Accountant General*, the sums of £3950 and £5000, the amount of two instalments due in respect of an agreement by the Defendant for the purchase from the Plaintiff of the estate and premises in the bill mentioned.

The bill stated that the estate in question was on the 4th of *October* 1814 put up to sale by public auction and bought in by the Plaintiff, subsequently to which the Defendant entered into an agreement to become the purchaser, at the price of £15,500, payable by instalments, subject to the conditions of sale, by one of which the purchaser was to be let into possession of a part of the premises on the 1st of *November* following, at which time he was let into possession thereof accordingly. The abstract was delivered, and the first instalment paid, pursuant to the agreement, after which objections were made by the purchaser to the title as to part of the premises, but which objections, he en-

1816.

DIXON
v.
ASTLEY.

gaged by writing, should not amount to a waiver of paying the subsequent instalments.

The bill then charged several acts of ownership by cutting timber and coppice wood, ploughing up and altering the course of cultivation, &c. committed since the Defendant had become acquainted with the nature of the Plaintiff's title, and prayed a specific performance.

By the affidavit in support of the motion, together with those put in on the part of the Defendant, it appeared that the timber charged to have been cut down amounted to no more than an old ash tree (represented to have been very ornamental) and a cherry tree; the coppice wood sold and cut was alleged to be arrived at maturity. Other parts of the charges were not answered, but they appeared to amount only to some trifling alterations in the premises. The Defendant, by his own affidavit, alleged that a marketable title could not be made, and that he was desirous to relinquish his contract.

Sir *Samuel Romilly* and *Richards*, in support of the motion.

*Wingfield*, for the Defendant.

*The Lord* CHANCELLOR.

The general principle undoubtedly is, that if, by the terms of the contract, the purchaser is to take possession before a title is made, the vendor cannot move to have the purchase money paid into Court, on the mere fact of possession being taken. But, where the pur-

1816.

DIXON
*v.*
ASTLEY.

chaser has, after taking possession, exercised such acts of ownership as to alter the nature of the property, that is a ground for applying, at least, to have the purchase money properly secured. I must look into the affidavits, as to this point.

*Feb.* 3.

After reading the affidavits, the *Lord Chancellor* observed, that most of the acts of ownership appearing to have been committed had taken place at a period subsequent to the discovery by the Defendant of the objections which he had taken to the Plaintiff's title; and that, in such a case, slighter acts of ownership were sufficient to call for the interference of the Court than might be necessary where the objections have arisen subsequently, and no evidence of acts committed since the discovery made.

Ordered accordingly.

## NORWAY *v.* ROWE.

*Dec.* 13, 1815.
*Feb.* 3, 1816.

Exceptions to a report of impertinence may be taken after an order to expunge, until that order has been acted upon. Not necessary to take objections before the Master previous to excepting to a report of impertinence. Under the circumstances of the case, the Defendant was at liberty to take a general exception, without setting out the particulars in which he alleged the report to be erroneous.

THE bill, setting up a title to certain mines in *Cornwall* possessed by the Defendant, prayed an account of the profits thereof, and of all and every the

1816.

NORWAY v. ROWE.

quantities of ore raised thereout, the times when, and the respective values thereof, when, where, and to whom and for what price or prices sold, &c. and of the costs and expences of working and carrying on the business of the said mines during the time the Defendant worked the same.

The Defendant, by his answer, denied the Plaintiff's title; stated a case of abandonment which, by the custom of *Cornwall*, justified the possession of the Defendant, establishing the lessor's right to grant him a fresh lease, which he had done accordingly; and declined setting out the accounts.

Upon the coming in of the answer, the Plaintiffs applied for a Receiver and injunction, which the Court refused.

They then took an exception to the answer for not setting out the accounts; and the Master, upon argument, over-ruled that exception. Then the Plaintiffs excepted to the Master's report; and the Court, upon argument, directed the accounts to be set out.

The Defendant consequently set out all the accounts required by the bill according to the terms in which the accounts were prayed, in four schedules, one of which, relating to the costs and expenses of working the mine incurred by the Defendant, extended to 3577 folios.

On the 21st of *April* 1815, the Plaintiffs referred this schedule for impertinence, and the Master, after several attendances, reported the same impertinent. This report was signed on the 7th, and filed on the 8th, of *December;* and, on the next day, the 9th of

1816.

NORWAY
v.
ROWE.

*December*, the Plaintiff obtained an order to expunge the impertinence, of which he served the Defendant with notice on the 11th.

The Defendant now, on the 13th, moved to discharge that order to expunge, and that he might be at liberty to file an exception, *nunc pro tunc*, to the Master's report.

Sir *Samuel Romilly*, *Hart*, *Johnson*, and *Perkins*, in support of the motion.

*Leach*, *Bell*, and *Pepys*, for the Plaintiff.

On the part of the former, it was contended that, if what is considered to be the strict practice of the Court is to be followed, viz. that the exception taken to the Master's report must set forth all the particulars wherein it is alleged that the answer reported impertinent is not impertinent, no exception to the Master's report could be taken in the present case until after the order to expunge had been acted upon; and *Craven* v. *Wright* (*a*) is an authority that, after impertinence once expunged, the report cannot be excepted to. That it is necessary to shew by reference to the folios what it is to which you mean to except, which it would be manifestly impossible to do in such a case as the present.

They also relied on the diversity of practice prevailing in the Master's offices, respecting the allowing exceptions to answers, some of the Masters being of opinion that, unless you produce a literal answer to every part of the bill, exceptions must be allowed.

(*a*) 2 P. W. 181.

1816.

NORWAY *v.* ROWE.

To this it was answered that the impertinence was not yet expunged, so that the Defendant was even now in time to file his exceptions, according to his own view of the practice. That if the practice be such as, it is admitted, is generally considered to be the practice, the present application is for indulgence, and must be founded upon the merits; in which case it is at least expected that there should be merits to authorise such an application; but that this was, on the contrary, a case of great oppression, the cost of a mere office copy of the schedule amounting to £400, and the matter reported impertinent occupying upwards of 3000 folios. That it was not a case of surprise, the Master having, so long ago as the 22d of *November*, informed the parties of what he thought to be impertinent, thereby affording them sufficient time to consider what exceptions it would be expedient for them to take.

Sir *Samuel Romilly*, in reply, disclaimed the indulgence, and appealed to the strict practice; but said that, if it were necessary to go at all upon the merits, there had been twenty-four attendances before the Master upon the matter of the exceptions, between the months of *February* and *November*, manifesting a case of so much doubt as alone to constitute merits. That the ground of exception to the present report involved a question of considerable doubt in itself, being to what extent a Defendant, by submitting to answer, has bound himself to make a discovery of all the matters enquired into by the Plaintiff's bill (*a*). How was the filing of the report to be ascertained without warrant taken out, or any sort of notice whatever? Nay, according to the strict practice contended

(*a*) *Faulder* v. *Stuart*, 11 Ves. 296.

1816.

NORWAY v. ROWE.

for, the order might have been obtained immediately after the report filed, without the intervention of a single day. If the rule laid down by the case in *Peere Williams* (a) be correct, that which is now sought to be done can only be done by the permission of the Court. Otherwise, the business of expunging the impertinence, and of taking exceptions to the report, might go on at the same time.

*The* LORD CHANCELLOR,

The merits have nothing to do with the present case. There appears to be considerable inconvenience attending either view of the subject; but all I have to do is to decide according to the practice, and I must take time to enquire, and ascertain, what that practice is.

*Feb. 3.*

*The* LORD CHANCELLOR.

The question is, whether exceptions to the report of the Master, by which it is certified that a large mass of paper, constituting the principal part of the schedule to an answer, is impertinent, can be taken, after an order to expunge the impertinence.

It is admitted to be contrary to practice, in the case of a report of impertinence, to take objections with a view of founding future exceptions; and it is stated to be the opinion of practitioners that, if the exceptions are not taken before the impertinence is expunged, they

(a) *Craven* v. *Wright*, ubi supra.

1816.

NORWAY v. ROWE.

cannot be taken afterwards. Now, it is represented that this alleged practice is very inconvenient, and that, in a case like the present, it amounts to a total exclusion of the right to except, since it is impossible that exceptions can be prepared within so short a space of time so as to specify the matter which is the subject of those exceptions."

The rule is not accurately understood in any of the Master's offices; and there is nothing in the books concerning it but the case (*a*) cited at the bar. That case lays it down that, where the matter is reported *not* scandalous or impertinent, the Plaintiff must, in his exceptions to the Master's report, specify the particulars in which he alleges the report to be erroneous; but it says nothing of the converse of that proposition, and proceeds to establish another rule in the case where the answer *is* reported scandalous or impertinent, viz. that exceptions cannot then be taken after the Master has once expunged.

I think it the safest course to adhere to the rule so laid down; but, until the impertinence has been actually expunged, exceptions may still be taken, notwithstanding the order to expunge has been obtained; and since, in the present instance, the substantial ends of justice would be defeated if the exceptions were required to contain the whole matter of the schedule which has been reported impertinent, let the Defendant be at liberty to file a general exception (*b*). It is the

(*a*) *Craven* v. *Wright*, ubi supra.

(*b*) See *acc.* where the answer was reported *not* impertinent, a general exception allowed to be taken. *Mackworth* v. *Briggs*, 2 Atk. 182. *Purcell* v. *M'Namara*, 12 Ves. 169.

1816.

NORWAY v. ROWE.

more material that this liberty should be given, because it is extremely desirable that it should, once for all, be understood how much of a question a Defendant is bound to answer; and whether, if a Plaintiff chooses to ask such questions as it has become the usual practice to introduce into bills of this nature, he can object, on the ground of impertinence, to a Defendant who thinks proper to answer them at full length.

## GORDON *v.* GORDON.

*Jan.* 20.
*Feb.* 6.

Bequest to the natural child of which a woman was *enceint*, without reference to any person as the father, held good, there being no uncertainty in the object described.

LIEUTENANT-COLONEL *Thomas William Gordon*, by his will bearing date the 4th of *October* 1805, after providing for the payment of his debts and giving divers pecuniary legacies, gave and bequeathed all and every his property, of whatsoever nature it might be, unto his brother, the Defendant, *James Murray Gordon*, and appointed him and the Defendant *Alexander Gordon* joint executors of his said will.

The testator some time afterwards was sent abroad on foreign service, and was made a prisoner by the *French* and taken to *Lyons*, where he remained until the time of his death.

While he remained a prisoner in *France*, the testator made several testamentary papers, in the nature of codicils to his will, which were in his own handwriting,

1816.

GORDON
v.
GORDON.

and were, respectively, (so far as affects the case in question) as follows.

"*Lyons*, 7th *May*, 1811.—Be it known that I am the reputed father of a child (male) which *Margaret Genot* brought into the world in the month of *September*, 1810. The boy was christened *George Louis*. This boy I wish to have removed to *England*, where I wish him to be educated at my expense, that is to say, with the sum which I am about to appropriate for that purpose. I hereby give him £100 sterling a year, to commence from the time he arrives in *England*. To the mother of this child I give the sum of £100, which I wish to be paid to her as soon as possible after the child is arrived in *England*. I hereby give and bequeath to *Adrienne Maillet*, late of the *Rue Bat d'Argent*, *Lyons*, the sum of £200 sterling (exchange at par) which is a mark of my friendship for her.—*Thomas William Gordon*."

"*Lyons*, *November* the 12th, 1811.—As I have reason to believe that the aforesaid *Adrienne Maillet* is pregnant by me, I do hereby give and bequeath to her £50 sterling yearly, exchange at par, and £100 more in addition to the £200 mentioned in another part of this my will and testament. I wish the child of which she is now pregnant to be sent to *England* and educated as *George Louis*; the expense of which is to be paid for by a like annuity of £100, to commence from the arrival of the child in *England*; upon which occasion I wish £100 more to be sent to *Adrienne Maillet* at *Lyons*.—*Thomas William Gordon*."

"*Lyons*, 18th *May*, 1813.—I hereby give and bequeath to my reputed natural daughter, *Adrienne Gordon*, born at *Lyons* in the year 1812, £1500, the in-

1816.

GORDON
*v.*
GORDON.

terest of which will be paid to her every six months, (the annuity paid during my life ceasing,) until she attains the age of twenty-one. Should she die before that age, or should she marry and die without having children, £500 of the above £1500 are to be paid to her mother *Adrienne Maillet* of *Lyons*, and the remaining £1000 I hereby bequeath to my reputed natural son *George Gordon*, to whom I hereby further bequeath £1500. I hereby give to the said *Adrienne Maillet* £500 sterling.—*Thomas William Gordon*."

The testator died shortly after the date of the last mentioned instrument; and the Plaintiff, who was his natural daughter, mentioned in that instrument under the name of *Adrienne Gordon*, and in the instrument immediately preceding as the child of which *Adrienne Maillet* was then pregnant, filed a bill, by her next friend, against the executors and residuary legatee, (who had proved the will and the several instruments as codicils thereto,) praying that she may be declared entitled to the annuity of £100 for her life besides the legacy of £1500.

The Defendants, by their answer, admitted assets; but the Defendant the residuary legatee submitted that the Plaintiff was not entitled to the annuity of £100, in addition to the £1500 legacy, inasmuch as she was an illegitimate child of the testator not born at the time when the bequest was made.

The cause was set down for hearing in his Lordship's paper of causes; but, with a view of obtaining a more speedy decision of the principal question at issue, a motion was this day made on the part of the Plaintiff, "that the Defendants might, within a month, transfer to the *Accountant General* in trust in this

1816.

GORDON *v.* GORDON.

cause the sum of £3333. 6*s.* 8*d.* £3 per cent. consolidated Bank annuities, as a fund to answer from the dividends thereof the annuity of £100 bequeathed by the will of the testator."

*Hart*, and *Bell*, in support of the motion.

The only question before the Court arises upon the effect of the codicil bearing date the 12th of *November* 1811; the other testamentary papers being of no importance with regard to it except as they tend to explain it by way of reference.

The objection to the present application must be founded on one of the grounds following; either that the object is not sufficiently identified to be rendered certain, or that there is a general and positive rule of law prohibiting a putative father from making any provision for an afterborn child.

If the question is intended to be argued on the first of these grounds, and the case of *Earle* v. *Wilson* (*a*) to be relied upon as the authority deciding the present, it is sufficient to shew that that case does not apply, the words there "to such child or children as she," the person therein named, "may happen to be *enceint* with by me," implying a manifest uncertainty, which does not exist in the phrase adopted by this testator, who specifically describes the object of his bounty as the child wherewith *Adrienne Maillet* was at that time *enceint*. There is no doubt that an illegitimate child *en ventre sa mere* is capable of being so fully described as to identify the object. (*b*)

(*a*) 17 Ves. 528.

(*b*) *Blodwell* v. *Edwards*, 2 Roll's Ab. 43. Tit. *Graunts*, D. 11.

1816.

GORDON v. GORDON.

Then, is an individual in the unfortunate situation of the present Plaintiff absolutely incapable of taking under a bequest made while *en ventre sa mere*, however plainly pointed out as the object of it? In answer to this question it is necessary to resort to the principle of law laid down by Lord *Coke* (*a*), that a bastard cannot take until after he hath gained a name by reputation. But the cases cited in support of that doctrine are all cases of deed, not of devise; and, accordingly, in *Wilkinson* v. *Adam* (*b*), which was decided on the ground of intention, your Lordship expressly considered the question as still left open, whether those cases have necessarily established that no future illegitimate child can take under any description in a will (*c*). Deeds are to be construed according to the strict principles of law, which govern the construction of wills only where a different intention is clearly expressed, and then the sole question must be, whether the object of that intention is competently described.

The case of *Metham* v. *the Duke of Devon* (*d*) is the only case in which it is laid down that an illegitimate child not *in esse* is incapable of taking by will. But the very ground of Lord *Macclesfield*'s judgment in that case shews its inapplicability to the present, it being founded expressly upon the policy of the law to discourage the immorality which consists in an illicit intercourse, therefore establishing that a testator shall not be allowed, in contemplation of such immoral act, to provide for the issue which may arise out of its commission. But *here* the immoral act is already complete, and the provision made by the testator is not in

(*a*) Co. Litt. 36.
(*b*) 1 Ves. & B. 422.
(*c*) p. 468.
(*d*) 1 P. Wms. 529.

1816.

GORDON v. GORDON.

contemplation of its commission. The child, though unborn, is actually *in esse;* the criminality which the law seeks to prevent is actually incurred; and the immorality would be tenfold greater in leaving the innocent offspring of that illicit intercourse without a provision, than in the act itself. Not only, indeed, does the policy of the law not prohibit, it imperatively demands, the making such a provision, and even compels the father, in certain cases, to do, for an illegitimate offspring while in *ventre sa mere,* that which he is not compellable to do for his legitimate offspring, namely, to give security for its maintenance. Shall he not, then, be admitted to do voluntarily that which he may otherwise be compelled to do by the magistrate?

In *Earle* v. *Wilson*, the *Master of the Rolls* laid down the rule, as established by the authority to which Lord *Coke* refers (*a*), and adopted by Lord *Macclesfield*, to be this; "that a bastard cannot take as the "issue *of a particular person,* until it has acquired the "reputation of being the child *of that person,* which "cannot be before its birth;" and said, by a very refined distinction, that "if the bequest had been to the "natural child of which a particular woman was *enceint*" (not adding, as in that case, the words "*by me,*") "without reference to any person as the father, there would be no uncertainty in that bequest; *but probably it would be held good.*"

In the present case there is no embarrassment like that which his Honour found in *Earle* v. *Wilson.* The expression "whereas I have reason to believe, &c." does not amount to an assertion of the subject of that

(*a*) *Blodwell* v. *Edwards*, Moor, 430. 2 Rol. Ab. 43. Cro. El. 509. Noy. 355.

belief, but is merely a statement of the reason which induced the testator to make this particular bequest.

Sir *Samuel Romilly* and *Wetherell*, for the Defendant, the residuary legatee.

If the rule so often referred to be in fact, what it appears to be in terms, that name and reputation are necessary to render valid a bequest to an illegitimate child, it is clear that the present bequest cannot do. The case of *Metham* v. *The Duke of Devon* is express upon this subject. There the devise was "to *all* the natural children" of the Duke by Mrs. *Heneage*; and Lord *Macclesfield* held that those only could take, who had acquired the reputation of being such children *before* the will was made, and that the enquiry must therefore be, not who were in point of fact such children, but who had acquired the reputation of being so before that period (*a*).

The rule, therefore, requires that the parties must actually be born in order to be capable of taking; and, being laid down thus generally, it is of no consequence whether they are described as the offspring of the mother, or of the putative father. It does not proceed upon the uncertainty as to whose children they really are. All that was really known in the case before Lord *Macclesfield* was that Mrs. *Heneage* had children, some born before, others after, the date of the testator's will. The difficulty of ascertaining whether the children were the Duke's children was as great with respect to the one class as to the other. Therefore it is evident that the case was governed by that positive rule which admits of no distinction arising out of particular circumstances.

(*a*) 1 P. Wms. ubi supra, and see 1 Ves. and B. 458.

1816.

GORDON
v.
GORDON.

Then, what is it they rely upon in support of the present application? On nothing but a *dictum* of the *Master of the Rolls* in the case of *Earle* v. *Wilson*, which amounts to no more than this; that there was in that case a distinction which rendered it unnecessary for him to decide it on the general principle. But, in reality, that case of *Earle* v. *Wilson* is a direct authority against the point that is contended for in the present. In both, the testator gives to the child with which the woman is then *enceint*, as the child of him the testator, and it would be a much more extraordinary refinement to find a distinction between the words used by the testator in that case and those employed by the present testator, than any that exists in the distinction taken by the *Master of the Rolls* in the words attributed to him. The ground taken by his Honour was this, that a man cannot give to an illegitimate child, *as his own*, until it is known to be, or has acquired a reputation of being, his.

But, supposing such a bequest can be framed as to give to an illegitimate child yet unborn, still that bequest must be so framed as to avoid the difficulty arising in the case of *Wilson* v. *Earle*. It must describe the child by reference to the mother only; any mention of the supposed father immediately opens all the uncertainty which is admitted to be fatal to such an endeavour.

*The Lord* CHANCELLOR.

If the words in this case were these, "Whereas *A.* is now pregnant by me," this would imply a positive assertion of a fact, the truth of which it cannot, on grounds of public policy, be suffered to sustain by evidence. But a man may most conscientiously make use

of the terms adopted by this testator to denote his belief of a fact, and his intention to proceed, not upon the fact itself, but upon such his belief of it. No doubt where a man assigns certain positive reasons for giving a legacy, if those reasons fail, the legacy may be taken away. But here the testator has expressed the grounds upon which he acts to be these: I believe that I am the father of the child with which this woman is now *enceint*. I may be mistaken; but I had rather run the risk of providing for a child that is not my own, than of incurring the guilt of leaving a child of mine without a provision.

*For the residuary Legatee.*

The same reasoning would have applied to *Earle* v. *Wilson*. Where a man uses the words "I give to the child wherewith *A. B.* is *enceint* by me," he cannot be taken, in fairness, as asserting any thing more positively, as to a thing which in its very nature must be uncertain, than that he believes the child to be his.

The argument raised from the poor laws, it is obvious, does not at all apply; because the provision which they require is for the relief of the parish, not with reference to the individuals.

*Hart*, in reply.

That which must be your Lordship's opinion in the present case is sufficiently to be collected from the words which fell from your Lordship in *Wilkinson* v. *Adam* (*a*). "I know no law against devising to the "children of a woman, whether natural or not; as "that creates no uncertainty. The difficulty arises "upon a devise to the children of a particular man by

(*a*) 1 Ves. & B. 446.

1816.

GORDON v. GORDON.

"a woman to whom he is not married." And again, "The testator says that children, though not born "within six months after his death, shall take, if born "within the longest period allowed for gestation; and "that is explained in such a way, that the devisees "would take, whether his natural children or not; as "he there describes them only as *her* children." The case of *Blodwell* v. *Edwards* (a), where we see the foundation of the doctrine, appears never to have been decided; and it goes only to the question whether there is a sufficient description to point out the individual. This was the single point in the case, the question of public policy on the ground of immorality having nothing to do with it; for the parties there had acted most morally, and the difficulty arose on a doubt as to the validity of the marriage created subsequently to its solemnization (b).

(A point was also raised, in argument, as to the operation of the codicil of 1813 as a republication of that of *November* 1811, and the case of *Arnold* v. *Preston* (c), referred to as an authority against its having that effect; but the *Lord Chancellor*'s judgment proceeded on the general ground only.)

*The* LORD CHANCELLOR.

If I had been apprised that this case was intended to come under discussion to-day, I should have looked into *Wilkinson* v. *Adam*, which I will yet do before I decide it. I have no objection to the form in which this is brought before me, on motion; but it is my wish to give not only my own opinion on it, but also that of the Judges who assisted me in the case referred to.

(a) Ub. sup.

(b) See the report of this case in Cro. Eliz. 509, 510.

(c) 18 Ves. 288.

As to the general question of disability, the *Master of the Rolls* appears to have thought that it is not impossible to give effectually a legacy to a child with which an unmarried woman is pregnant, but that there is a difference between giving to that child as the child with which she is pregnant generally, and as being the child with which she is pregnant by a particular man; and the reason of the distinction is, that, in the latter case, you cannot try the fact whether it is, or is not, the child of the man so named in the will. Where, on the contrary, the gift is only to the child of the woman, there can be no uncertainty, no fact to be tried; and then arises the question whether, by the policy of the law, such a child is absolutely precluded from taking under any description whatever.

* *

I have gone a great way to persuade myself that Lord *Coke*, in the passage so often cited, did not mean, and that the cases referred to by him do not bear him out in meaning, to say, that this is the law on the subject.

* *

Then there is another question, whether this case does not fall within the distinction taken by the *Master of the Rolls* in *Earle* v. *Wilson;* that is, whether the words here made use of are not equivalent to the words, "*by me*," upon which that case was decided. In order to make out this, you must establish that it could not be the testator's intention that the child in question should take at all, unless it were *his* child. But is this construction necessary? He has said, "Whereas I have reason to believe that *A. B.* is pregnant by me, I wish the child of which she is now pregnant to take, &c.;" and I am required to read this as if he had said, "I wish *my* child by *A. B.* to take, &c." But is it contrary to conscience to suppose

1816.

Gordon v. Gordon.

that he rather meant to say this—"I have reason to believe that this woman's child is my child; but I had rather run the risk of providing for a child that may not be mine, than of leaving my own child unprovided for. I state my belief as the motive of this bequest—"?

Many cases may easily be imagined of the most dreadful difficulty, if the rule be admitted that no unborn illegitimate child can by possibility be provided for. Suppose a father suffering under the affliction of having an only daughter seduced, and afterwards abandoned and left pregnant by her seducer. Does the law impose upon him the additional affliction of being unable, in his last moments, to make any provision for the unfortunate creature which owes its being to that seduction? What ground is there, in morality, or in the policy of the law, that can justify such a conclusion?

In *Wilkinson* v. *Adam*, the difficulty was this; there was no mode of trying the question. Where such a question is to be tried, the proof must at all times be very difficult; and, on grounds of evident policy, the law says very rightly that you shall not be permitted to enter into any evidence upon it. You shall not be allowed to prove whose the child is, but only whose it is reputed to be; and then it follows that the child must be born, for, until born, it has no reputation.

That case, however, is not the present case. I shall say no more about this now, than that I think it a good legacy; but I shall not decide without having other authority, besides my own impressions, to act upon.

*The* Lord Chancellor.

1816.

Gordon *v.* Gordon. *Feb.* 6.

"There are two questions in this case.

Upon the first of these, which is the general question, I remain of my former opinion, that it is possible to hold, consistently with the doctrine of Lord *Coke*, that, if an illegitimate child *en ventre sa mere* is described so as to ascertain the object intended to be pointed out, it may take under that description. Then, with regard to the application of that principle to the present case, I studiously abstain from expressing any opinion as to what it would be if the words were, "to *my* child," while I decide that, the words being only "*the* child with which *A. B.* is now pregnant," those words will do so as to give effect to the intention in its favour. I have spoken to the Judges who assisted me with their opinion in *Wilkinson* v. *Adam*, and they concur with me in that which I at present deliver; so also does the *Master of the Rolls*, this being considered as not in any degree affecting the principle of his decision in *Earle* v. *Wilson*.

I repeat that this is not to be taken as governing either the question of what would be my decision if the words were "to my child," or that which would arise out of a bequest to an illegitimate child not only unborn, but not *in esse*, even though it may be sufficiently pointed out as the child of a particular mother.

1816.

*Feb.* 8.

## GORDON *v.* BERTRAM.

Plaintiff filing a bill of revivor, after decree, and neglecting to revive, the Defendant, having answered, allowed to proceed on the Plaintiff's bill.

AFTER decree, the Plaintiff filed a bill of revivor, to which the Defendant put in his answer; but no order to revive the suit had been obtained. The bill of revivor was filed on the 31st of *October*, and the answer put in on the 23rd of *December* following.

The Defendant now moved that the Plaintiff might, within a week, obtain an order to revive, or, in default, that the suit might stand revived, from the time of making this application, without further order.

*Horne*, in support of the motion, produced the authority of *Whitehear* v. *Hughes* (*a*), upon which *The Lord Chancellor* made the following order:

"That the Plaintiff do within a week after notice hereof, obtain an order to revive the suit; but in default of the Plaintiff's obtaining such order within the time, then that the Defendant be at liberty to draw up the order to revive the suit."

After the expiration of the time allowed, *Horne* again moved, upon affidavit of service, and that the Plaintiff had not obtained an order that the Defendant might be at liberty to draw up the order to revive the suit.

Ordered accordingly.

(*a*) 1 Dick. 283.

1816.

*Ex parte* DYSTER in the Matter of MOLINE. *Jan.* 22, 23.

(ON another point in this case, viz. whether a dormant partner is within the statute 21 Jac. I. c. 19., see 2 Rose, 256.)

A sworn broker of the city of *London* entitled to prove in respect of debts arising out of transactions in which he has been engaged as principal, notwithstanding the restriction in the statute 6 Ann. c. 16.

If he acts ostensibly as broker in any of those specific transactions in which he was so concerned as a principal, such acting is a gross fraud, in respect of which he can obtain no remedy in a Court of Justice.

Therefore, in the present case, an enquiry directed, there being no direct charge affecting him in respect of such last mentioned dealings.

The petitioner was a broker of the city of *London*; and, to a debt sought to be proved by him under the bankrupt's commission, it was objected that, as such broker, he was precluded by his bond to the city in a penalty of £500, and by the oath taken upon his being admitted a broker, from trading as a principal; and that, notwithstanding these obligations, he had had joint dealings with the bankrupt, as a principal, upon the balance of which transactions he claimed to prove as aforesaid. The question now before the Court, upon this petition, was, whether the policy of the law will allow a debt to arise out of such transactions.

By statute, 6 Ann. c. 16. § 4.; it is enacted "that, "from and after the determination of this present ses-"sion of Parliament, all persons that shall act as "brokers within the city of *London* and liberties "thereof, shall from time to time be admitted so to do "by the court of Mayor and Aldermen of the said city, "for the time being, under such restrictions and limita-"tions for their honest and good behaviour as that "Court shall think fit and reasonable."

1816.

*Ex parte* DYSTER in the Matter of MOLINE.

In 1708, the year after this act passed, the Court of Mayor and Aldermen made certain rules and regulations for the government of brokers, which have ever since been, and still are in force, and by virtue of which every person, previous to his being admitted a broker, is required to enter into a bond to the Mayor, Commonalty and citizens of *London*, and also to take an oath, the forms of which are prescribed by the same rules and regulations, and are, in substance, as follows:

*Condition of the bond.* "That the said *A. B.*, for and during such time as he shall and doth continue in the said office and employment, shall and do well and faithfully execute and perform the same without fraud, covin, or deceit; and shall, upon every contract, bargain, or agreement by him made, declare and make known to such person or persons with whom such agreement is made the name or names of his principal or principals, either buyer or seller, if thereunto required, and shall keep a book or register, and therein truly and fairly enter all such contracts, bargains, and agreements, within three days at the farthest after making thereof, together with the names of all the respective principals for whom he buys or sells, and shall upon demand made by any, or either of the parties buyer or seller concerned therein, produce and shew such entry to them or either of them to manifest and prove the truth and certainty of such contracts and agreements, and for satisfaction of all such persons as shall doubt whether he is a lawful and sworn broker or not, shall, upon request, produce a medal of silver with his Majesty's arms engraven on one side, and the arms of this city with his name on the other, and shall not, directly or indirectly, by himself or any other, deal for himself or any other broker in the exchange or remittance of money, or in buying any tally or tallies, order

1816.

*Ex parte* DYSTER in the Matter of MOLINE.

or orders, bill or bills, share or shares, or interest in any joint stock to be transferred or assigned to himself, or any broker, or to any other in trust for him or them, or in buying any goods, wares, or merchandizes, to barter and sell again upon his own account, or for his own or any other broker's benefit or advantage, or to make any gain or profit in buying or selling any goods over and above the usual brokerage; and shall and do discover and make known to the said Court of Mayor and Aldermen, in writing, the names and places of abode of all and every person and persons, as he shall know to use and exercise the said office or employment, not being thereunto duly authorized and empowered as aforesaid, within thirty days after his knowledge thereof, and shall not employ any person under him to act as a broker within the said city and liberties thereof, not being duly admitted as aforesaid, and shall not presume to meet and assemble in *Exchange-alley*, or other public passage or passages within this city and liberties thereof, other than upon the *Royal Exchange*, to negotiate his business and affairs of exchange, to the annoyance or destruction of any of his Majesty's subjects, or any other, in their business or passage about their occasions."

*Form of oath.* "You shall sincerely promise and swear, that you will truly and faithfully execute and perform the office and employment of a broker between party and party in all things appertaining to the duty of the said office or employment, without fraud or collusion, to the best of your skill and knowledge."

The nature of the transactions in which the petitioner was engaged, after he had entered into the bond and taken the oath aforesaid, and while he still con-

1816.

*Ex parte* DYSTER in the Matter of MOLINE.

tinued in the office or employment of a broker within the city of *London* and liberties thereof, and upon which the prayer of his petition was founded, appeared upon affidavit to be that, for many years previous to the bankruptcy of *Moline*, the petitioner was concerned with the bankrupt and another person, in a secret partnership, in the purchase and sale of hides and skins; and it was further sworn that, during the whole continuance of such secret partnership, he bought and sold hides and skins on commission, as broker, and charged his employers a brokerage or commission on the sale or purchase thereof, although some of such goods were sold by him to the bankrupt on account of the said secret partnership.

The sums for which the petitioner claimed to be entitled to prove as debts arising out of the aforesaid transactions, amounted to upwards of £20,000.

Sir *Samuel Romilly*, *Cooke*, *and Roupell*, in support of the petition.

If the present application is opposed at all, it must be, either on the ground that the transactions, in respect of which relief is sought to be obtained, are positively illegal, or that they are fraudulent and against conscience, and that, in either case, a Court of Justice will not interpose to give effect to a contract having such transactions for its foundation.

If these transactions are illegal, they must be so in consequence of some direct statutory prohibition; but no such statute can be produced, nor is there a single judicial decision in support of the allegation. If it be said that the regulation made by the city of *London* amounts to a legislative enactment, as being in pursuance of a power vested in the city by an act of the legis-

lature, it must be first seen what is the nature and extent of the authority actually given to the city by the statute of Anne. By attending to the recital of that statute, then, it will be made manifest that it was intended as a mere revenue law. It recites, for the purpose of repealing, a former act of Parliament (16 Jac. I. c. 19.) entitled "An act for the well garbling of spices;" and, proceeding to abolish the office of garbler of spices under that act, provides that, from that time forward, "all persons that shall act as brokers within the city of *London* and liberties thereof, shall from time to time be admitted so to do by the Court of Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that Court shall think fit and reasonable, and shall, upon such their admission," pay certain fees to the *Chamberlain* of the city and otherwise as therein prescribed, to be applied, in the first place, towards making a compensation to the then holder of the office so to be abolished, and afterwards "to go to, and be enjoyed by, the said *Mayor* and *Commonalty* and citizens" of *London*. A penalty is then laid upon all persons from thenceforward taking upon themselves to act as brokers without being admitted as aforesaid (*a*). It is evident, from the whole tenor of this statute, that its object was to secure to the city of *London* certain pecuniary advantages by way of compensation for the office which was thereby abolished. The city has no power to constitute that an illegal transaction which the legislature has not declared to be illegal. Such a restriction, it is easy to shew, would be contrary to the whole course of our commercial policy, considered in any other light than that of a mere contract between individuals not to do a particular act, except under

(*a*) Stat. 6 Ann. c. 16. § 4 and 5.

1816.

*Ex parte* DYSTER in the Matter of MOLINE.

*certain conditions. Then the character of a city* broker is not different from that of a private factor. The factor is bound by certain obligations entered into with his employer. But the Court will not refuse its interference in transactions between the factor and a third person, because those transactions are contrary to the obligations so entered into. The employer has his remedy, secured by the contract, for the breach of those obligations; but the breach of them does not affect the rights of the parties in any other respect than as between one another. So, here, a bond is entered into, and the city of *London* has a right to maintain an action for the breach of its conditions. Suppose, upon a dissolution of partnership, one of the partners to enter into a covenant with the others not to exercise the same trade within a given distance of the place where the partnership has been carried on. Would this covenant deprive him of all right to recover, as against third parties, in respect of dealings carried on in violation of his covenant? So, the city of *London* may make what regulations they please as to the terms of a contract between itself and its own individual members; but those regulations can never constitute, or form any part of, the law of the land.

Then with regard to the objection on the ground of the transactions being unconscientious or fraudulent, and therefore not relievable. No particular act of dishonesty is charged against this individual. It is not pretended that, in any instance, he has taken advantage of his situation as broker to gain an unfair profit in the way of his trade by artifice or misrepresentation. The charge of fraud stands on the mere ground of its being inconsistent with his duty, as a broker, to carry on business as a merchant. It is inconsistent with his duty so to do, in consequence of a

positive engagement to the contrary entered into with the city of *London*, confirmed by an oath truly and faithfully to execute the office of a broker between party and party, in all things appertaining to his duty as such broker. In the first place, the city of *London* has no right to impose such an oath. The statute, authorizing the city to make regulations, gives no authority for enforcing those regulations by an oath. The oath is, therefore, merely voluntary, and such as the law cannot judicially notice. But, in the next place, how has this person acted in violation of his oath? It is not alleged that he has not conducted himself in his office truly and faithfully as between party and party. Whatever fraud there may be in this transaction, rests entirely with the bankrupt, seeking to elude a just demand by setting up an unjust and dishonest objection. If any third person had been defrauded by this broker, the transaction might have been impeached on the ground of fraud, and that, whether an oath had been taken to the contrary, or not. Suppose, by articles of partnership, a party binds himself not to carry on trade except for the benefit of the partnership, and the parties take it upon themselves to enforce this obligation by an oath; can the Court act upon an oath taken under such circumstances (*a*)?

(*a*) In the course of the argument for the petitioner, a decree made in the case of *Marsh* v. *Blakesly*, at the Rolls, *November* 30, 1812, was produced, by which it appeared that the Plaintiffs (who were wool-brokers within the city of *London*) by their bill, praying an account against the Defendants (who were *Blackwell - hall* factors) in respect of the following transactions, stated an agreement made and entered into between the Plaintiffs and Defendants, "that, as "any parcels of wools of- "fered in the market, on "which a profit might be

1816.

*Ex Parte* DYSTER In the Matter of MOLINE.

*Hart*, *Bell*, and *Montagu*, for the assignees.

The objection to this demand is that the debt claimed is not proveable, as arising out of an illegal transac-

"expected, the same should "be purchased on account "of the Defendants, and "that, on any resales there-"of which the Plaintiffs "should make, the profit or "loss should be shared be-"tween the Plaintiffs and the "Defendants." That the Plaintiffs afterwards advanced the sum of £5000 to the Defendants upon condition of being admitted, as partners, to one-third of the profits of their trade as *Blackwell-hall* factors; the wools bought and sold not to be considered as part of the trade, but the profits thereon to be divided as before. The bill then stated considerable purchases of wools to have been made by the Plaintiffs for the Defendants, in respect of which they had advanced upwards of £10,000, which the Defendants had subsequently repaid, but had not accounted for the profits made upon the re-sales of the wools so purchased, which profits, the bill charged, amounted to £19,859, to one half of which the Plaintiffs claimed to be entitled under the agreement.

The Defendants, by their answer, among other grounds of defence, insisted that the business of wool-brokers carried on by the Plaintiffs consisted in buying and selling of wools on account of other persons, and that those who act as such brokers within the city of *London*, are restricted by a bond given by them to the Lord Mayor of the said city, and by an oath which they take on obtaining a licence from the Lord Mayor and Aldermen to act as brokers within the same city, from buying and selling wools in their own names and on their own accounts.

By the decree it was referred to the Master to take an account of the dealings and transactions between the Plaintiffs and Defendants respecting the several matters in the pleadings mentioned, and to enquire and state to

tion; and the illegality of the transaction consists in this, that *Dyster*, being ostensibly a broker, has really acted as a principal.

First, Could he have been entitled to recover on such a transaction, setting aside the statute of Anne and the regulations of the city of *London*?

Secondly, If so, is he deprived of his right to recover by the effect of those prohibitions?

Another point has been raised in argument, that, supposing he could not recover against third persons, still this constitutes no ground of resistance to a claim as against his partner in respect of partnership dealings. But the answer to this question depends upon the preceding; for, if the claim arises out of an illegal transaction, the Court will give no assistance to a contract which tempts to a transgression of the law. *Mills* v. *Brooks* (a), *Aubert* v. *Maze* (b), *Knowles* v. *Haughton* (c), *Cousins* v. *Smith* (d).

The question, then, resolves itself into this. Does the present claim arise out of an illegal transaction?

the Court in what shares and proportions the several parties were entitled to the profits arising from the several transactions in the bill mentioned.

On the other side, this case was not admitted to be of any authority, inasmuch as it does not appear that the objection made by the answer was brought forward in such a way as to be taken into consideration by his Honour in pronouncing his judgment.

(a) 3 Ves. 612.

(b) 2 Bos. and Pull. 271.

(c) 11 Ves. 168.

(d) 13 Ves. 542.

1816.
Ex Parte
DYSTER
In the Matter of
MOLINE.

*If a partnership were formed with a view of the* parties enriching themselves by deceiving others, such a partnership would be clearly illegal. I do not say, in this case, that a broker cannot deal as a principal, but that he cannot be permitted to hold himself out to the world as a broker, being in fact a principal; and that a partnership bottomed on such an understanding must be void. Dealings of this description cannot be reasonable or fair, regard being had to the expectations under which a broker is employed. In dealing with a proprietor, the party is aware of the colour which interest is likely to lend to the subject under discussion; but, in dealing with a broker, he knows he is not only entitled to impartial advice, but that it is the interest of him whom he consults to advise impartially; and the practical effect of discovering that, instead of broker, he is in fact a principal, would be to withdraw his confidence altogether.

The present case, however, does not rest upon abstract principle. The petitioner is a broker of the city of *London*, and, as such, is restrained by positive law from acting as a principal.

The statute (*a*) provides that persons shall be admitted to act as brokers under such restrictions and limitations for their honest and good behaviour as the Court of Mayor and Aldermen shall think fit and reasonable. The questions under this act are three. 1st, Can the legislature give, or, 2ndly, has the legislature given, to the Court of Mayor and Aldermen, a power to prevent such transactions as these? 3rdly, If the legislature has given, has the Court of Mayor and Aldermen exercised, the power?

(*a*) 7 Ann. c. 16. § 4.

1816.

*Ex Parte* DYSTER In the Matter of MOLINE.

That the Legislature *can* give such a power is evidenced by a number of instances, as in the cases of inclosure and turnpike acts, and those enacting discretionary punishments. In many cases it is absolutely necessary for the Legislature to repose such a discretionary power somewhere.

Then it is impossible to find words more strong than in this case, to shew that the Legislature has in fact given the power which it is certainly able to give, and which the urgency of the case demands. It is impossible to maintain that this statute is a mere revenue law. A part of it, indeed, relates to pecuniary compensation; but what have the words, "Such regulations as the court shall think fit, for their honest and good behaviour," to do with pecuniary compensation? How can it be said that this is analogous to those cases in which a person is merely liable to undergo the penalty of his bond for the breach of it? As in the supposed case of an outgoing partner who covenants not to exercise the trade within certain limits? That is a mere private question between the parties themselves; attended with no deception on the public, no intention to mislead either buyer or seller; and the parties have accordingly fixed that which they consider to be a sufficient indemnity for the non-performance of the condition. The present case is wholly different. The broker is a servant of the public. The object of the Legislature is to prevent double dealing, to generate confidence in the minds of his employer, and to preserve untainted evidence. The Court of Mayor and Aldermen have executed the power in the same spirit in which it was given them. The requisites of the bond, which are in themselves very reasonable and strictly conformable to the objects in view,

1816.

*Ex Parte* DYSTER In the Matter of MOLINE.

are, among other things, that the obligee shall not buy or sell on his own account either directly or indirectly; and the oath, which is faithfully to discharge his duty, is imposed in aid of the bond as an additional obligation. Where is his duty to be found? In the bond. The bond informs the broker in direct terms what his duty is; and the oath has, therefore, immediate reference to, and is completely explained by, the bond (*a*).

(*a*) In this part of the argument, *Montagu* referred to the printed report of a case, *Brooke* v. *Guy*, at *Nisi Prius*, *April* 28, 1802, before Mr. J. *Grose* and a special jury of *London* merchants, for a libel. The alleged libel consisted in a letter published by the Defendant, wherein he charged the Plaintiff (who was a wool-broker in the City) with having made certain illegal profits on wool sold by him in that capacity; and it contained, among others, the following remarkable passage relative to the supposed duties of a city-broker:

"I found that certain cautions and regulations are established for the admission of brokers, and for their conduct in that situation; particularly, that, before a broker can be admitted to act, he must petition the Court of Aldermen, and his petition must be signed by three aldermen and twelve respectable inhabitants of *London*, stating that he is of *fair character*, and of sufficient abilities to act as a broker. The party then enters into a bond that he will faithfully execute the duties of his employment, without *fraud, covin*, or *deceit*; and, among other regulations, 'that he will not, &c (*a*).' Having executed this bond, an oath is administered to him before the Lord Mayor or presiding Magistrate at the next Court of Aldermen, in the form following (*b*). It appears, then, that your duty, as a broker, is to settle the price of the

(*a*) Ante, p. 156.

(*b*) Ante, p. 157.

1816.

*Ex Parte* DYSTER In the Matter of MOLINE.

Then, if these regulations are such as the Court of Mayor and Aldermen had the power to enact, and which they have enacted accordingly, have they, in truth, been violated by this petitioner?

commodity between party and party, for which you receive a brokerage, or fixed commission, and that you are not at liberty to traffic on your own account. Having thus ascertained what the duties of a broker are, and that he is bound by the most awful and solemn pledge, that is known in civilized society, to keep men faithful together; and that you had come under those obligations, and continued to pay for the privilege of exercising the functions of that office, I felt astonished at the recollection of what I have before stated to have heard, but what I afterwards learned totally confounded me. I found that it was generally supposed that you had been for many years availing yourself of the advantage which the solemnity of an oath deters all *honest* men from, and been acting as a wool-broker and merchant in the same instance; that you had been connected with several merchants in the wool trade, in the purchase and sale of the article: to one gentleman I was introduced, who in the most candid manner informed me that for several years he had bought and sold *Spanish* wool, on joint account with you; and, to satisfy me of the fact, he shewed me his books of account, whereby it appeared you had regularly divided the profits with him for a number of years, in various purchases and sales. In the course of conversation he said, when he was in Holland, you recommended him to purchase all the wool he could, *on your joint account*, and to send it to *London*, and that you, in the mean time, would *raise the market here*;—that he accordingly did make purchases, and that you shared the profits with him."

Mr. Justice *Grose*, in his address to the jury on summing up the evidence, used

1816.
*Ex Parte*
DYSTER
In the Matter of
MOLINE.

First, it is provided that upon every contract made by him he shall declare the name of his principal, buyer or seller. So far from doing this; instead of declaring himself to be the principal, he has come forward in a character which, *primâ facie*, excludes the notion of his being principal. He has come forward as broker; and, by so doing, has declared to the world that *Moline* is the only person interested, and that he has himself nothing to do with the transaction, except as broker merely. Next, he is required to keep a book, and therein enter all contracts, with the names of all the respective principals, within three days respectively after the meeting thereof. Now *Dyster*'s name does not once appear in his books as a principal. *Moline* is the buyer, *Moline* the seller, and *Dyster* stands forth as broker only. Lastly, he shall not, either directly or indirectly, buy or sell on his own account. He has done both: and the question is, shall he be allowed to reap the fruit of so shameful a violation of his positive duty? This illegal partnership has existed for a long series of years, and would still have existed but for the bankruptcy which caused a discovery of the

the following words in reference to this printed letter. "I think this paper is a most excellent treatise upon the duty of a broker. Whether the Plaintiff is to continue a broker or not, I do not know; but if he is, I wish he would read it, and attend to it, every day of his life. For better observations on the duty of a broker, on his oath, on his bond, and upon every thing which he ought to do, and some things which he ought not to do, I am sure I never read."

The Jury found a verdict for the Defendant; and the Court of Mayor and Aldermen afterwards brought an action in K. B. against the Plaintiff for a forfeiture of his bond, in which he suffered judgment to go by default.

whole transaction. It now turns out, in consequence of this involuntary disclosure, that not one entry in the books is true, and that both bond and oath have proved an inadequate restraint upon these fraudulent dealings.

Sir *Samuel Romilly*, in reply.

This case has been argued on two distinct grounds; first, on that of a positive law prohibiting these transactions; secondly, on that of their being contrary to moral principle. It must be observed that this restriction is considered in the light of a bye-law, having the force of a statutory enactment. If so, it is merely local; and it would be difficult to shew, if it were meant to put down transactions immoral in their nature, or if it were declaratory of the common law of the land, how it came to be confined to the City of *London*. To put it at the highest, it amounts to no more than this; it declares that no man shall be admitted to act as a broker except at the will of the City of *London*, and that, when so admitted, he shall execute this bond. This is the security which they require to be given. They have therefore chosen their own remedy, and may resort to it by enforcing the penalty of the bond in every case of infraction.

Next, with regard to the oath imposed. The easiness with which such oaths are violated is indeed a matter of serious and painful consideration, and yet the violation of them is of every day's occurrence. In the instance of this particular oath, there is not a broker in the City of *London* who is not perjured, at least according to the construction now put upon it; for, if the oath has reference to the bond, then every

1816.

*Ex Parte* Dyster In the Matter of Moline.

man is perjured, who, being admitted as broker, has made a single bargain any where but on the *Royal Exchange*, or who has not made the prescribed entry in his books, within three days after the bargain concluded. But this is a rigorous and not a necessary construction. In substance, all that the broker has sworn is not to defraud his employers. If he does this, either by concealment or by misrepresentation, he really violates his oath; but not otherwise.

The question then is, whether, this being an act which *Dyster* has singly taken upon himself not to commit, that constitutes such an illegal contract as the Court will refuse to lend its assistance in carrying into effect even against a third person, who endeavours to protect himself against a just demand by raising so dishonest an objection; a third person, who has himself been privy to the illegal dealing; and an objection, which, if suffered to prevail, must be admitted to the extent that a broker, bringing an action to recover his brokerage, cannot succeed if it can be shewn that he has in any one instance infringed the conditions of his bond.

The ground of immorality, independent of positive law, is still more absurd in its consequences than the former. A man shall not be suffered to hold out false colours; so that, if a tradesman advertises his shop as the cheapest shop in *London*, and in a single instance does not sell according to the strict letter of the advertisement, he shall not be able to recover his debts against any person with whom he has had any dealings whatever. The question here is not what is the effect of these dealings as between a broker and his employers, nor even as between partners in the same bu-

1816.

*Ex Parte* DYSTER In the Matter of MOLINE.

siness in which one acts as a broker; but it is between partners in other transactions and in different parts of the kingdom. Besides, a part of the debts which is claimed to be proved, consists not of the profits of trade, but of mere money balances.

*The Lord* CHANCELLOR,

The first question is, whether this case is to be decided on general principles, or merely upon the duty of a broker as prescribed by the City's regulations. If on the former, it is contended that this is the case of a person holding himself out, in a number of buying and selling transactions, as an impartial, disinterested adviser, when in truth he is a party having a concealed interest in the matters on which he advises. But if it is to depend merely on the City's regulations, and supposing that there is no more in the case than, as it is pretended, a mere bond given to the City not to engage in these dealings, I must hold that there is no ground for saying that he shall not recover from his creditors because he has forfeited his bond. If it shall turn out, however, that that bond was introduced by virtue of some legislative enactments, as I suspect to be the case, the true question will be, whether this species of trading is or is not virtually prohibited by the Legislature; and in this view of the case it is necessary to look into and examine the City records, and the statutes relative to brokers, passed previously to the act of Queen *Anne*, in order to see how far these regulations of the City of *London* are mere substantive regulations, or are in pursuance, and according to the known intent, of the Legislature, in passing that statute.

It is very singular, and hardly to be supposed, that

1816.

*Ex Parte* DYSTER In the Matter of MOLINE.

this point was entirely overlooked in the case which has been referred to on the part of the Petitioner (*a*).

---

*Feb.* 8.

*The Lord* CHANCELLOR.

The objection made to the proof of this debt on the ground that the petitioner is a City of *London* broker, has been stated two ways; first, that he is, as such broker, positively prohibited from engaging in those transactions in respect of which his claim is made; secondly, that, if not positively prohibited, still the transactions are of such a nature as a Court of Justice will not aid.

If the objection were confined to this latter branch of the argument, it would be necessary to direct an enquiry into these transactions; for there is nothing on the face of the present proceedings which imports that he was actually a principal in those very dealings in which he was ostensibly concerned as a broker. If that fact were distinctly brought before me, I should have no hesitation in saying that no action could be maintained in respect of those transactions, inasmuch as they clearly amount to a fraud.

On the other point, if it could be made out that the law of the land has positively prohibited a broker from trading, there would be no more difficulty than in the first view of the case. It is clear that the Courts will give no assistance towards enforcing a remedy on an illegal contract.

(*a*) *Marsh* v. *Blakesly*, ante, note (*a*) p. 161.

1816.

*Ex Parte* DYSTER In the Matter of MOLINE.

The true question in this case is, Has the law of the land prohibited these transactions?

In this view of the case, I have thought it necessary to furnish myself with the records of the city of *London* for the purpose of ascertaining what are the precise restrictions upon the office in question, and I have looked into the statutes from the earliest period (*a*). Upon

(*a*) The statutes, which were referred to, and cited in succession by the *Lord Chancellor*, are the following:

1. Stat. Civitatis London: 13 Edw. I. stat. 5.

" Ne nul *abrocour* ne seit denz la citee forceaus qe soent receuz e jurés devant le gardeyn ou Meyre e Aldermans."

2. Stat. 1 Jac. I. c. 21. entitled " An act against brokers," reciting the manner of admitting brokers by the Mayor and Aldermen, pursuant to the statute of *London*, and an oath taken by them on admission " to use and demean themselves uprightly and faithfully between merchant *English* and merchant strangers, and tradesmen, in the contriving, making, and concluding bargains and contracts to be made between them concerning their wares and merchandizes to be bought and sold, and contracted for within the city of *London*, and monies to be taken up by exchange between such merchant and merchants, and tradesmen."

3. Stat. 8 and 9 Will. III. c. 32., (continued for seven years by another statute, 11 and 12 Will. III. c. 13, and afterwards suffered to expire), by which it was enacted, among other things, that no broker should act within the limits of the city of *London*, without being licensed by the Court of Mayor and Aldermen; that, after being admitted, he should take an oath, the purport of which is " that he will truly and faithfully execute and perform the office and employment of a broker between party and party, in all things appertaining to the duty of the said office, without fraud or

1816.

*Ex Parte* DYSTER In the Matter of MOLINE.

the general result of this examination, I think it was clearly the intention of all these provisions, (call them restrictions, limitations, regulations, or by whatever name is thought most suitable,) founded upon a most obvious policy, to prevent the broker from trading on his own account. The object of them, however, is foreign to the present point, which depends entirely upon what is the consequence, in point of law, of a city broker so trading.

Are these consequences merely confined to the penalty of the bond, and dismissal from his office? Or do they extend to create a disability to sustain an action in respect of these prohibited dealings?

In general cases there is no doubt that a man may bind himself not to do a particular act, and yet, if he does that act, is not prevented from maintaining an action in respect of matters arising out of the act so committed. As, for instance, a trader who covenants not to exercise his trade within five miles of *London*, cannot do a more dishonest thing than to trade in violation of that covenant; nevertheless the law of the land has not prohibited him. He knows he is liable to

collusion, to the best of his skill and knowledge, and according to the tenor and purport of the said act;" and should subscribe a bond, the form of which is therein also specified.

4. Stat. 6 Ann. c. 16., at present in force, as to which it is observable that the oath thereby prescribed (a) confines the duty of the broker *to his acting fairly and honestly between party and party*, without any express reference to the mode of acting, like the former oaths.

(a) Ante, p. 157.

forfeiture, and if he chuses to incur the penalty of his covenant, he may legally do so. In like manner, a freeman may be liable to be disfranchised for a particular act, which act may, notwithstanding, be rendered the foundation of an action.

It appears to me, in the present case, that the city of *London* has not, *totidem verbis*, prohibited a broker from trading. They have said that, if a broker shall trade, he shall incur a penalty by so doing; but there is an end.

With respect to the oath, the fair construction of that is, between party and party, with reference to what particular acts, it imposes the obligation to be faithful in performing this office. If he is bold enough to incur the consequence of a violation of his oath, there is no authority to prevent him from so doing.

Upon the general view of this question, then, I do not think that the ground now taken will afford the means of successfully resisting the claims of the petitioner. If a broker of the city of *London* trades for himself, openly and in public, he does that which the policy of every legislative enactment meant to prohibit. If he mixes in a transaction, in which he is ostensibly the broker, but really a buyer or seller, this is a gross fraud; but this is a case not now before me, and there must be an enquiry to see whether that allegation can be supported. But, as to the question with the city of *London*, they have not said, You shall not trade. They have said only, If you trade, we will dismiss you; and this, I think, they have a right to do. Therefore he is prohibited *sub modo* only; but he has not done that which the law will consider as being incapable of being made the ground for supporting an action.

1816.

*Ex Parte* DYSTER In the Matter of MOLINE.

*I am, therefore, of opinion that this ground of objection to the debt will not suffice.* With regard to the other, you may have an enquiry whether, in any and what transactions, on which the petitioner's present demands are founded, he has really been the buyer or seller, while he ostensibly acted as broker.

Feb. 15.

## *Ex parte* GOLDIE in the Matter of GOLDIE. (a)

A bankrupt in custody previously to the issuing of his commission is not privileged against subsequent detainers.

ON the 15th day of *November*, 1815, the petitioner having been previously arrested for large sums of money, duly surrendered himself to the *King's Bench* prison in discharge of his bail; and, on the 30th of *October*, 1815, a commission of bankrupt issued against him; but, owing to the difficulty of proving the bankruptcy, it was not opened until the 18th of *November*, 1815. The petitioner surrendered and obtained his protection from the commissioners. Subsequently to this, a detainer was lodged against the petitioner at the suit of creditors for £1500 and upwards, and it was alleged that the object of the parties, in lodging these detainers, was to prevent the petitioner bailing the actions wherein he had previously surrendered himself, and that, if the petitioner was relieved from the detainers, he could obtain the benefit of the rules as to the original arrests, and, farther, could procure bail and obtain his liberty.

The question was, whether under the statute 5 Geo. II. c. 30, § 5., the bankrupt was entitled to be discharged from these detainers, the section providing that the bankrupt should be free from arrest, restraint,

(a) *Ex Relatione.*

1816.

Ex parte GOLDIE In the Matter of GOLDIE.

*or imprisonment, provided he was not in custody at the time of his surrender.*

It was argued, in support of the petition, that the intention of the legislature, collected from all the statutes constituting the law of bankruptcy, was that the bankrupt should be protected from the arrest and imprisonment at the instance of all creditors, except of those at whose suit he was in custody, prior to the granting of his protection—that a right to detain could not exist where there was not a right to arrest; and here it could not be maintained, that if the bankrupt had succeeded in liberating himself upon bail before these detainers had been lodged, the detaining creditor would have been authorized in arresting.

On the other side, the express terms of the section of the statute were relied on, that whatever might have been the intention of the legislature, *quod voluit non dixit*. There was not any promulgation of an intention, which a Court of Justice could recognize.

*The* LORD CHANCELLOR

Coincided in that view of the case, and declined to make any order.

Sir *Samuel Romilly and Rose*, in support of the petition.

*Hart and Heald*, for the respondents.

1816.

ROLLS.
*Feb.* 17.

## ACTON *v.* ACTON.

Legacy to *A.* of £12000, and to *B.* of £4000, the latter sum directed to be paid out of money in the hands of the testator's agent. At the time of testator's death there was a sufficient fund in the agent's hands to answer this legacy; but the general assets did not extend to the payment of both. Legatee of the £4000 held entitled to be paid by priority.

SIR *John Edward Acton*, Bart. by codicil to his will, bequeathed as a portion to his daughter the Defendant *Elizabeth Acton* £12000, and to his niece *Isabella Acton* £4000, directing that the said sum of £4000 should be paid out of the money in his banker's or agent's hands in England.

At the time of the testator's death, there was a sum of money in the hands of his agent, exceeding the sum of £4000; but the whole amount of his personal property, after payment of debts and specific legacies given by the will, was not sufficient to discharge both the legacies mentioned in the codicil.

The question was, whether the legacy of £4000 ought to be paid in full, or whether the fund in the hands of the executors ought to be apportioned between the two legatees named in the codicil.

*Heald*, for the Defendant, *Elizabeth*, relied on the distinction taken in the case of *The Attorney General* v. *Parkin* (*a*), between the gift of a sum due on a given security, or out of a particular fund, and the gift of the security or fund itself; a distinction which, though overruled by *Lord Thurlow* in *Ashburner* v. *M'Guire* (*b*), has been again made, and fully recognised, in the later cases (*c*). Suppose the agent in this case had been a bankrupt; it is not to be imagined that the testator

(*a*) Amb. 566.

(*b*) 2 Bro. 108.

(*c*) *Roberts* v. *Pococke*, 4 Ves. 150. *Kirby* v. *Potter*, 4 Ves. 748. *Fryer* v. *Morris*, 9 Ves. 360. and see *Gillaume* v. *Adderley*, 15 Ves. 384.

1816.

ACTON v. ACTON.

meant the legacy to depend upon such a contingency. He could not have intended that it should be altogether lost, provided there was no fund in the hands of his banker or agent to answer it. Then, if this legatee would have had the benefit, in the case supposed, of such a construction as that the legacy is not specific, but general, it is but fair that, in the case which has actually happened, she should incur a diminution in proportion to the other general legatees.

*The* MASTER *of the* ROLLS.

This is a question of priority, not of ademption. No other legatee can have any right to the fund so appropriated till after payment of the £4000. That legacy must therefore be paid in full out of the money reported to be in the agent's hands at the time of the death of the testator.

## LEWIS *v.* LOXAM (a).

ROLLS.

*Feb.* 19.

Upon reference to the Master as to the title, a report that *A. B.* with the concurrence of *C. D.*, &c. can make a good title is an excess of his authority, being a report upon the conveyance rather than upon the fact, title or not. Parties therefore having omitted to take exceptions to it are not concluded by its confirmation.

SUSANNAH *Gordon*, seised in fee of certain premises, conveyed them to the Defendant in trust to sell for the payment of her debts, and with or without her consent; his receipts to be a discharge to the purchaser.

(a) *Ex Relatione.*

1816.

LEWIS
v.
LOXAM.

The Defendant agreed to sell the premises to the Plaintiff; but, previously to the completion of the agreement, *Susannah Gordon* quarrelled with the Defendant, and filed a bill against him to set aside her conveyance to him, alleging that it was obtained improperly, and had been intended to be merely a conditional, not an absolute conveyance. That bill was dismissed for want of prosecution. Under these circumstances, the Defendant hesitating to perform the agreement with the Plaintiff, the latter instituted the present suit for a specific performance; and a reference was made to the Master upon the title.

The Master reported that, with the concurrence of *Susannah Gordon*, and not without, the Defendant could make a good title. This report was not excepted to, and was confirmed.

The cause now came on upon that report. The Plaintiff pressed for a decree that the Defendant should procure the concurrence of *Susannah Gordon*, or, in default of such concurrence, that the bill might stand dismissed, and the Defendant pay the costs of the proceedings. For the Defendant, it was contended that the question of title was still untouched, and that the Master's report was a mere nullity; his authority under the reference being merely to say aye or no to the title, whereas he had reported upon the conveyance, and the necessary parties to it; that, having exceeded his authority, the Defendant was not bound to take exceptions to the report, nor could be prejudiced by an omission to do so; and that the Plaintiff could therefore only take the usual decree for a specific performance.

Sir *Samuel Romilly* and *Wilson*, for the Plaintiff.

1816.

LEWIS v. LOXAM.

*Benyon* and *Rose*, for the Defendant.

*The* MASTER *of the* ROLLS

Inclined to this view of the case; but, as the point was new, and of importance, thought it better to raise it on a special application, either by petition or motion for a reference to the Master to review the matters referred to him.

The cause was ordered to stand over with liberty to make such application.

POLLOCK and Wife *v.* CROFT and Another.

ROLLS. *Feb.* 19.

Bequest of personal estate to *A.*, provided she marry with the consent of *B.*, but, if she marry without such consent, then to *C.* A general permission given by *B.*, after *A.* attained twenty-one, to contract marriage as she might think fit, and subsequent approbation of a marriage contracted under such general permission without his knowledge, held a sufficient compliance with the requisition.

LIEUTENANT *Victor Fielding*, by his will, gave and bequeathed to his mother *Mary Magdalen Williams*, (since deceased) the rents, interest, dividends, and annual proceeds of all his estate and effects whatsoever for her life, and, from and after her decease, he gave, devised and bequeathed all his estates in *Leicestershire*, and his house in *Harley-street*, and all his personal estate whatsoever and wheresoever, to the Defendant *Croft*, his executors, administrators, and assigns, upon trust to pay the rents, issues, interest, dividends, and annual proceeds thereof to his sister *Mary Victorine Fielding* (the Plaintiff), so long as she should continue single and unmarried, to and for her

1816.

POLLOCK
v.
CROFT.

own proper use and benefit; and, in case she should marry with the consent of his said mother in writing under her hand, or, after the decease of his said mother, with the consent of *Croft*, then from and after such marriage with such consent as aforesaid, and from and after the decease of his said mother, upon trust to convey and assign the said estate in *Leicestershire*, and his said house in *Harley-street*, and the residue of his estate and effects, unto the said Plaintiff, her heirs, executors, administrators, and assigns, absolutely for ever; but if she (the said Plaintiff) should depart this life without having been married with such consent as aforesaid, or should marry without such consent as before is made requisite, then, from and after her death or marriage without such consent as aforesaid, and also from and after the death of his said mother, upon trust to assign the said house in *Harley-street* to his brother *Hugh Huntley Fitzroy* (another Defendant) his executors, administrators, and assigns absolutely;" and he appointed the Defendant *Croft* executor of his will, who afterwards duly proved the same.

The testator left no real estates, nor any residuary personal estate, except the house in *Harley-street* mentioned in the will, which was leasehold, and which was sold by the executor for payment of his debts, and the surplus invested by him in the funds.

The testator's mother died in 1812, leaving the Plaintiff, *Mary Victorine Fielding*, unmarried, who thereupon became entitled to the interest of the securities on which the said surplus had been so invested; and who, (as the bill stated) having attained her age of twenty-one years, was permitted and allowed by the Defendant *Croft*, after the death of her mother, to contract marriage as she might think fit, without any

restriction being imposed on her in respect thereof by the said Defendant, and without his requiring her, the said Plaintiff, to apply to him for his consent in any particular instance, he, instead of such particular consent, *consenting generally* to her marrying whom she might think fit, relying upon her own discretion as to the choice she might make.

The bill further stated that, having such general consent as aforesaid, and conceiving the same was a sufficient consent for the purpose of satisfying the terms of the will and the intention of the testator, she, the said Plaintiff, on the 29th of *June* 1814, intermarried with the Plaintiff *Hugh Pollock*; and insisting that, having so married, she became absolutely entitled to the surplus monies so invested as aforesaid, prayed a declaration and transfer accordingly.

The Defendant *Croft*, by his answer, said that, the Plaintiff having attained her age of twenty-one years in her mother's lifetime, he (the Defendant) did not impose any restriction upon her as to her contracting marriage, but permitted her to use her own discretion, not intending to oppose any match she might think proper to make, unless the same should be so extremely objectionable as he might conceive his duty absolutely compelled him to endeavour to prevent; and that, not having apprehended that she would marry improperly, he so far consented generally to her marrying according to her own discretion as not to require from her to ask his previous consent. He further said that he had not, nor ever had, any objection to the marriage in question, and that he should have given his previous consent thereto, if such consent had been required by her the said Plaintiff, and which consent was not required upon the presumption, as he ap-

1816.
POLLOCK
v.
CROFT.

prehended, that the same was not necessary in consequence of such general consent or acquiescence as aforesaid, and also because he had not given to her any intimation of the necessity of applying for any further particular consent, or that he expected she should do so.

The Defendant *Fitzroy*, an infant, by his guardian, submitted to the Court whether the marriage of the Plaintiff was had with such consent as is required by the testator's will, and, if not, claimed the surplus monies arising from the sale of the house in *Harley-street.*

*Fonblanque* and *Horne*, for the Plaintiff,

Said that, admitting the condition in this case to be a condition precedent, it was at best very questionable whether, by the policy of the law, it could be intended that any restriction was imposed by the testator upon the Plaintiff in respect of marriage, after she should have attained the age of twenty-one; but, if it could be held to be so designed, still they submitted that there had been such a consent, in this case, as to satisfy the intention, and relied on the distinction made between the consent required to be given by the mother and that required to be given by *Croft* (the former being expressed to be in writing, and no mode of consent whatever being pointed out as to the latter) as evidence to shew that in the one case the testator meant to vest a more absolute authority than in the other; and that, in the latter, he wished only to give such a controuling power to his executor as might prevent the Plaintiff from involving herself in an imprudent match. That, in order to give effect to this view of the case, the words "*without* such consent," must be taken to mean "*against* such consent," there-

by leaving her free to act, unless positively prohibited, in any particular instance, from acting. And they relied on *Burleton* v. *Humphries* (a), *Knapp* v. *Noyes* (b), and *D'Aguilar* v. *Drinkwater* (c), as authorities for this view of the question.

*Courtenay*, for the Defendant *Croft*,

Referred to *Daley* v. *Desbouverie*, for the purpose of submitting that a declaration might be made in the present, similar to the one which appears from Lord *Hardwicke*'s note to have been introduced in that case, viz. "that, under all the circumstances, the marriage ought to be considered as having been had with the approbation and consent of the trustees." (d).

*Merivale*, for the Defendant *Fitzroy*,

Submitted that the consent, in this case, was required to be in writing, the words "such consent as aforesaid" referring to the mode before required in the case of the mother consenting. If not, then he contended that the general permission given by *Croft* was no consent, but an abandonment of his trust, and referred to *Graydon* v. *Hicks* (e), as an authority, that an executor invested with a similar power, and renouncing his office, does not thereby divest himself of this peculiar trust. That the cases cited in support of this general consent, and many more which might be cited to similar effect, were either cases of implied and tacit consent, which are, according to what is said in *Harvey* v. *Aston* (f), cases of such a nature "as where

(a) Amb. 256.

(b) Amb. 662.

(c) 2 Ves. and B. 225.

(d) Vid. *Dashwood* v. Lord *Bulkeley*, 10 Ves. 230, p. 241.

(e) 2 Atk. 16. p. 19.

(f) 1 Atk. 375.

1816.
POLLOCK
v.
CROFT.

the father has made the marriage himself," amounting to this, that there has been encouragement, or at least no discouragement, together with actual privity or knowledge, of the particular match in question (*a*), or else, where the consent once given has been subsequently withdrawn, as in *D'Aguilar* v. *Drinkwater*; or they were cases of consent given *after* the marriage, as indeed it had been in the present instance; but then such subsequent consent had been held to be valid, either there being no limitation over, and the restriction being therefore held to be merely *in terrorem* and void (*b*), or on account of some peculiar circumstances, not to be found in the present case, as that the testator was a parent, or *in loco parentis*, and therefore bound to make a provision for a child who would otherwise be left portionless (*c*). That the present case was clearly distinguishable from all these, the marriage having been entered into without the privity of the person whose consent was required, there being a limitation over, and that to a person in an equal degree of relationship to the testator with the Plaintiff, and the testator himself neither being a parent, nor *in loco parentis*, there being no suggestion that the Plaintiff would be left portionless, but for the provision he made for her. That, on the point of *subsequent* approbation being at all available in a case where the consent is made a condition precedent, Lord *Hardwicke* had expressed a considerable degree of doubt, in the case of *Berkley* v. *Ryder* (*d*), even

(*a*) *Mesgret* v. *Mesgret*, 2 Vern. 580. *Daley* v. *Desbouverie*, 2 Atk. 261. *Campbell* v. Lord *Netterville*, 2 Ves. 534. Lord *Strange* v. *Smith*, Amb. 263. *Dashwood* v. Ld. *Bulkeley*, 10 Ves. 230, &c.

(*b*) *Reynish* v. *Martin*, 3 Atk. 330. *Mercer* v. *Hall*, 4 Bro. 326, &c.

(*c*) *Burleton* v. *Humphries*, Amb. 256. *Knapp* v. *Noyes*, Amb. 662.

(*d*) 2 Ves. 533.

though the words there used were "consent and approbation," not consent only, and it being the case a person *in loco parentis*.

1816.

POLLOCK v. CROFT.

*Fonblanque*, in reply,

Rested upon the general disposition of the Courts to favour the slightest circumstances on which a consent may be raised, especially where no particular mode of giving the consent is pointed out by the testator, who, in such cases, appears to intend no more than to constitute a person as guardian, so to watch over the conduct of his ward as to prevent her from contracting an improper or prejudicial alliance, and mentioned the late case of *Goldsmid* v. *Goldsmid* (a), which had not before been cited.

*The* MASTER *of the* ROLLS

Took time to look into the cases, and, some days afterwards, expressed his opinion that the consent appearing by the Defendant *Croft*'s answer to have been given in this case was a sufficient consent, provided it were made to appear properly in evidence, but that that answer could not be read for such purpose against the infant; and directed a reference to the Master, to enquire whether any and what consent was given by the Defendant *Croft*, to the marriage between the Plaintiffs, with liberty to report the special circumstances; and for such purpose all necessary parties to be examined (b).

(a) Cooper, 225.

(b) See on the subject of conditions of marriage, 1 Fonbl. Treat. on Equity, 255, note (q). See also, Sanders's Atkyns, Vol. I. p. 381, note (1), and Vol. II. p. 265. note (1).

1816.

Feb. 24.

## *Ex parte* ROSCOE in the Matter of SERGENFRY (a).

A person attending Commissioners for the purpose of being examined as to the property of the bankrupt is not entitled to have his expences paid or ascertained till his examination is concluded.

THE petition, by the assignees of a bankrupt, alleged that the bankrupt, previously to his bankruptcy, had made improper transfers of his property to his relations, and, amongst others, to *Worrall*, whom the assignees summoned accordingly before the Commissioners. *Worrall* attended pursuant to the summons, but demurred to his examination unless his expences of travelling from *Liverpool* (the place of his residence), of his stay in town, and of his return home, were previously paid.

The assignees offered to pay such expences as the Commissioners, after the examination, should think reasonable. The Commissioners, however, thought that the expences ought to be paid in the first instance; and, assessing them at £25, they made a minute on the proceedings that that sum ought to be paid to *Worrall* previously to his examination.

The assignees appealed from this decision, and, undertaking to pay whatever the Commissioners should, after the examination, reasonably adjudge, prayed that the minute might be expunged, and the Commissioners directed forthwith to proceed with the examination.

Sir *Samuel Romilly* and *Montagu*, in support of the petition.

This question depends entirely upon the construc-

(a) *Ex Relatione.*

1816.

*Ex Parte* ROSCOE In the Matter of SERGENFRY.

tion of a statute, in which the party summoned is con-ned, not as a witness, but as one who has embezzled property of the bankrupt. All analogy, therefore, the practice of law in regard to witnesses is inapplicable. *Battye* v. *Gressley* (a), *Ex parte Benson* (b), *allet* v. *Mears* (c).

*Hart* and *Cullen.*

The statute (d) leaves this to the discretion of the Commissioners. To say that they must withhold the expences until the result of the examination be ascertained, is to say, what the legislature has not said, that the expences of the party summoned are to depend upon his conduct. Immediately upon the party presenting himself before the Commissioners, his right to his expences attaches. At law, the witness has his remedy against the one, of two litigants, who exacts his attendance. In these examinations, there are no litigants; the reimbursement is entirely dependent on the Commissioners.

*The Lord* CHANCELLOR.

However unreasonable it may be, that a person put to the inconvenience and expence of attending for examination before the Commissioners should not have a source from which to derive his reimbursement, this is a question with which I have nothing to do.

The point to be considered is, how far the legislature has provided for that reimbursement. Upon the subject of costs little is to be collected. The petitioning

(a) 8 East, 319.
(b) 2 Rose, 75.
(c) 13 East, 15.
(d) 1 Jac. I. c. 15. § 11.

1816.

*Ex Parte* ROSCOE In the Matter of SERGENFRY.

creditor is expressly liable for the costs of prosecuting the commission up to the choice of assignees. At the choice of assignees, those costs are directed to be ascertained, and the petitioning creditor to be repaid by the assignees out of the first funds which shall come to their hands. If those funds should be insufficient, no provision is made for the contribution of creditors. the petitioning creditor must pay them himself. For the costs of witnesses no provision is made, except by that single clause of the statute (*a*), (if they can be considered as provided for by that clause,) or in consequence of an implied obligation on those who, requiring their testimony, have exacted their attendance. Under the statute, the burthen is not thrown upon the assignees, but expressly on the creditors, to be rateably borne by them according to the proportion of each of their several debts. It is true that the objection does not directly present itself in this case. The petitioner, as the assignee, has undertaken to pay all reasonable charges. It remains, therefore, only to be considered to what species of witnesses, (for it is only to "such witnesses" as the section provides for,) the remedy is applicable.

The statute of *Elizabeth* (*b*) empowers the Commissioners to call before them all persons known, or suspected, to have the property of the bankrupt in their possession, or to be indebted to his estate, and to examine such persons on oath. This authority is confined to persons of that class, and within that description.

That statute was found to be inefficient for its object, nor can a better explanation be given of its inefficiency

(*a*) 1 Jac. I. c. 15. § 11. (*b*) 13 Eliz. c. 7. s. 5.

1816.

*Ex parte* ROSCOE in the Matter of SERGENFRY.

than the subsequent provisions of the statute of *James*. Still, however, the eleventh section of the last mentioned statute is, as the clause in the 13th of *Elizabeth* had been, directed against persons known, supposed, or suspected, to have, or detain, the bankrupt's property, or to be indebted to him, or for his benefit. Is the construction of a statute, contemplating persons thus characterized, to be governed by analogy to the rule which the law has established for the indemnity of witnesses in ordinary litigation? Certainly not. A witness in a civil suit may insist upon having his expenses paid before he comes to the trial. Attending, he may refuse to give his evidence until his expenses shall have been paid to him; and, having refused to give his evidence unless that preliminary step was complied with, he may, although never examined, maintain an action for the expenses he has incurred in obeying the subpœna, a proposition which I should have hesitated to advance, without the authority of the case adduced in support of it (*a*).

Between a witness at law, and a person attending on the examination of Commissioners under this statute, there is a material difference. It has been held, over and over again, both here and elsewhere, that the latter is bound to attend, although his expenses should not have been tendered to him. (*b*)

The whole scope of the act contemplates, not a witness, but a person suspected; and although the latter clause adopts the word "witness," yet strictly he is not a witness till he has been examined. It seems to me to be a rule most consistent with the Act of Par-

(*a*) *Hallet* v. *Mears*, ubi supra.

(*b*) Ex Parte *Benson*, 2 Rose, 75. *Battye* v. *Gresley*, 8 East, 319.

1816.

*Ex parte* ROSCOE in the Matter of SERGENFRY.

liament and with justice that the costs should be ascertained, after the examination, rather than before it. The result of the examination will afford a clear view of what the party examined as a witness is entitled, in point of expense to be reimbursed. An adjournment, for example, might unexpectedly be made from time to time, and from meeting to meeting, without taking which into consideration, it would be impossible correctly to ascertain the expenses *eundo, redeundo, et morando*. Again, put the case that a person so to be examined had concealed £100 of the bankrupt's estate; would it not be a matter of regret that the assignees had, as a condition precedent to his examination, been obliged to pay a sum of money to a person who had thus anticipated his own re-payment? The policy of the statute requires that the examination should be first concluded. It is unnecessary to make any order; being enough, with these observations, to leave the case to the reconsideration of the Commissioners.

*Printed by J. & T. Clarke, 38, St. John's Square, London.*

# REPORTS

OF

# CASES

ARGUED & DETERMINED

IN THE

# HIGH COURT OF CHANCERY,

Commencing in the Sittings before

*MICHAELMAS TERM,*

56 Geo. III. 1815.

---

## BOOTLE *v.* BLUNDELL.

*Nov.* 24, 25, 27.

"In order to exonerate the personal estate from the payment of debts, the will must contain express words for that purpose, or a clear manifested intention; a *declaration plain*, or *necessary inference*, tantamount to express words."

*HENRY BLUNDELL*, Esq. of *Ince Blundell*, in the county of *Lancaster*, made his Will dated 24*th* of *July*, 1809, as follows:—

"First, I direct my Funeral Expences to be Paid.

"I give and bequeath to my son *Charles Robert Blundell*, and my daughters *Catherine Stonor* and *Elizabeth Tempest*, the sum of £3000 each, to be paid to them respectively, by my executors, as soon as conveniently may be after my decease; and if my daughters, or either of them, should happen to be dead, it is my will that the legacies, or legacy of such so dying, should go to their or her children respectively, in man-

1815.

BOOTLE v. BRUNDELL.

"It is impossible to define what circumstances will be sufficient to shew this intention, which must arise, in every case, from the context of the will." (a)

It is not required that the intention should be so manifested as that all persons cannot fail to agree with respect to it; but so as to convince the mind of the judge deciding the particular question.

It must be an intention, not only to charge the real estate, but to discharge the personal.

Circumstances from which an inference has been ordinarily raised, as that of the same person being constituted trustee of the real estate and executor; the personal estate being given as a residue, or as personal estate generally, or after an enumeration of particulars; the residuary legatee being also devisee of the real estate, or of part, for life, or otherwise, &c.; are circumstances entitled to consideration only in reference to the context of every particular will in which they occur.

The amount of the personal estate is not a circumstance to be enquired into, so as to furnish a ground for construction.

In this case, the personal estate was declared to be exonerated, upon the particular circumstances.

ner hereinafter mentioned as to my other bequests to them, equally, share and share alike.

"And I do hereby direct that my said funeral expences and legacies shall be paid out of such monies as I may have by me at the time of my decease, either at *Ince* or in the *Liverpool* bank; out of such monies as shall then be due to me from the corporation of *Liverpool*; and out of such rents or fines as shall then be due to me.

"And I give and bequeath the surplus to arise therefrom, after payment of the said funeral expences and legacies, unto my said son and daughters, share and share alike, or the issue of either or both of my said daughters, in case of her or their dying before me, as aforesaid, as to their shares respectively. And

(a) 1 Madd. Princ. and Prac. of Chanc. 475.

it is my will that these bequests to my said daughters shall be for their respective sole use, and not subject to the controul, debts, or engagements, of their husbands; and that their sole receipts shall be sufficient discharges to my said executors therefrom.

"I hereby declare that I have already disposed of certain sums of money, and securities for money which I lately had by me.

"I give and devise all my manors or lordships of *Lostock*, &c. unto *Edward Wilbraham Bootle*, *Stephen Tempest*, *Thomas Stonor*, *John Stonor*, and *Thomas Ridgway*, their executors, administrators, and assigns, for the term of five hundred years, to commence at my decease, without impeachment of waste; in trust, out of the rents and profits of the said premises, to pay my debts, and also all such annuities or legacies as are hereinafter mentioned, or which I may hereafter specify in any codicil or instrument in writing under my hand.

"And, in the first place, I give and bequeath unto each of my grandchildren now living, or which may hereafter be born, (being the issue of my said daughters by their now husbands), £1000, to be paid into the hands of their respective fathers, or if dead, their respective mothers, whose receipts respectively shall be sufficient discharges to my said trustees for the same.

"Also to each of my said trustees £300 for the trouble they will have in my affairs.

"And, upon further trust, to pay the several annuities hereinafter mentioned, which I give and devise to the several persons hereinafter mentioned re-

1815.

Bootle
v.
Blundell.

spectively, during their lives, to commence at my death."

Then, after specifying the several annuities so given, (among the rest, one of £—— to his housekeeper, Mrs. *Aspinwall*,) the testator proceeded:—

"And it is my will that my said trustees and executors shall not be answerable or accountable for any losses that may happen in the execution of this my will, nor for the monies or securities by me disposed of; and that if they are at any time called to such account, or sustain any expenses in respect thereof, the same, and also at all events all other their costs and expenses shall stand charged upon my aforesaid manors and hereditaments, and be paid out of the rents and profits thereof.

"And it is also my will, that, so soon as all the trusts of the said term of five hundred years shall have been satisfied, and all the charges and expenses incident thereto shall have been discharged, the remainder of the said term shall thenceforth cease; and, after the determination of the said term, and subject thereto, and to the trusts thereof, then, as to one undivided moiety of my aforesaid manors, &c. I give and devise the same unto and to the use of my said daughter *Catherine*, for life, without impeachment of waste." With remainders to her sons and daughters, in strict settlement. And, as to the other moiety, the Testator devised the same in like manner to his daughter *Elizabeth*, and to her issue: with cross remainders as to each of the said moieties; and with a power for every successive tenant for life, in possession, to charge the respective moieties by way of jointure.

The Testator then appointed a certain person to be

steward and agent, to have the management of the estates comprised in the said term of five hundred years, so long as the same should remain in the hands of his said trustees, with particular directions as to his salary and conduct; and afterwards proceeded as follows:—]

"And it is my will, that as soon as the debts hereby charged on my said estate, and the legacies or sums of money hereby given, are paid and satisfied, and as soon as such satisfactory security shall have been given to my said trustees, for the due payment of the said annuities and all expenses, as shall satisfy the said annuitants, and when all expenses incurred in the execution of the said trusts, respecting the said term, and of this will, shall be fully paid, then the person or persons who shall at that time be next entitled to the same estates, under and by virtue of the limitations in this my will contained, shall be let into the possession thereof.

"And in case of the death of any of them my said trustees of the said term of five hundred years, or their being unwilling to act or proceed in the execution of any of the trusts aforesaid, I hereby authorize and direct the survivors or survivor of them, or such of them, as shall be willing to act, to nominate and appoint any other person or persons they or he may think proper, to act with them as trustees or trustee; and I desire my said trustees, who may be unwilling to act, to release and assign all their trust estates and interest to my said other trustees willing to execute the same, and my new trustee or trustees to be appointed as aforesaid. And I declare it to be my will that such new trustee or trustees so appointed shall be as effectually invested with the trusts and powers mentioned in this my will, as if they or he had been originally

1815.

Bootle
v.
Blundell.

named therein. And it is my will that such new trustee, so to be appointed as aforesaid, shall be allowed and receive, out of the rents and profits of the estates comprised in the said term of five hundred years, the sum of £300.

"I give and devise the one half of the manor of *Lydiate*, purchased by me, and all the messuages, lands, and hereditaments, purchased by me in *Ince Blundell*, &c. or elsewhere, not hereinbefore disposed of, and also the land tax purchased by me therein, and in certain parts of my settled estates, unto and to the use of my said son *Charles Robert Blundell*, for his life, without impeachment of waste," with several remainders, and with an ultimate remainder, "to the use of the person or persons who shall, for the time being, be entitled to my aforesaid manors and estates of *Lostock*, &c. under the limitations in this my will, and for the like estates, and subject to the same provisos, restrictions, and limitations, as the same shall stand limited by virtue thereof.

"And it is my will that no person, tenant for life in possession of any of my aforesaid manors, half manor, and hereditaments, by this my will given and devised, for the time being, or any part thereof, shall have power to grant any lease of the same, or any part thereof, for any life or lives, nor for any longer term or terms than for seven or eleven years, under the best clear yearly rents that can be had for the same, and not upon any fine or fore gift.

"I will and direct that all my pictures, drawing books, prints, statues, and marbles of every kind soever, (except as I shall hereinafter give and dispose of,) shall be held and enjoyed by my said son during his natural life; and after his decease I give the same to the first

son of his body lawfully issuing who shall attain his age of twenty-one years, my wish and intention being that my said pictures, drawing books, prints, statues, and marbles, shall be considered as heir-looms, and go along with the capital messuage called *Ince Hall* and the inheritance thereof, making it my express request that no servant be at any time permitted to take vails or donations in any shape for shewing the same."

Then, after devising to *John Talbot* all his interest in certain lead mines in *Flintshire*, and to *Mrs. Mary Aspinwall* his housekeeper (also an annuitant named in the former part of his will,) several specific articles of furniture and other things which he directed should be removed by his executors as soon as conveniently could be done at the expence of his said personal estate, and to be carefully deposited in such place as she may appoint for that purpose, the testator proceeded as follows:

"I do hereby give and bequeath to my said son the furniture of my said house, my wines, horses, cattle, and carriages, plate, and other my goods, chattels, and personal estate, not herein before specifically disposed of, or which may hereafter be disposed of by me."

And, lastly, after giving certain recommendations to his son relative to the allowance of salaries and wages to his agents and servants, and both to his son and his trustees relative to keeping regular accounts of the rents and profits, and of the expenses of the estates devised to them respectively, he concluded in the following words:

"I do hereby appoint the said *Edward Wilbraham Bootle*, *Stephen Tempest*, *Thomas Stonor*, *John Stonor*, and *Thomas Ridgway*, executors of this my will.

1815.

BOOTLE v. BLUNDELL.

"And, lastly, it is my will that immediately after my decease my said executors or some or one of them enter my dwelling house and search my closets and private drawers and take into their custody and possession all my monies and all the papers there found, and that they destroy all such letters and papers as are of no use, and as they may think I wish not to be seen, and that no other person be allowed to look at any of my papers or intermeddle therewith until my said executors have first examined the same."

By a codicil to his will, dated the 25th of *May*, 1810, after noticing the devise to his son of the estate at *Lydiate*, the testator proceeded in the words following:

"And, whereas attempts may be made to set aside and invalidate my said will or some of the dispositions thereby or by this codicil made of my property with intent to prevent the same from taking effect according to my intentions, and the trustees and executors in my said will named or other person or persons in whose favour I have made the same may incur expences in supporting my said will and the dispositions thereby made of my property, which expences it is my will shall be charged upon and paid out of the said purchased half manor messuages, lands, hereditaments, and land tax, and for that purpose it is also my will that the several uses therein limited by my said will shall in the first place be subject to and charged with the payment of all such costs and expences as shall be so incurred, and also to the term of years hereby created for securing the payment of the same, and that such costs and expences shall not be a charge upon any other part of my property notwithstanding any thing in my said will mentioned to the contrary; in order to effectuate these my intentions, I do by this my

codicil give and devise the hereinbefore purchased half manor messuages, lands, hereditaments, and land tax, with their respective appurtenances, unto *Edward Wilbraham Bootle*, *Stephen Tempest*, *Thomas Stonor*, *John Stonor*, and *Thomas Ridgway*, trustees and executors named in my said will, their executors administrators and assigns, for the term of 1000 years, to commence at my decease, without impeachment of waste, in trust from time to time as occasion shall require by sale, lease, or mortgage, of all or any part of the said purchased half manor messuages lands hereditaments and land tax hereby devised to them for all or any part of the said term of 1000 years, or by and out of the rents and profits thereof, or by such other means as to them shall seem proper, to raise from time to time such sum and sums of money as shall be sufficient to pay all costs and expences which shall or may at any time or times hereafter be incurred or paid by my said trustees and executors, or any of them, their or any of their heirs executors or administrators, or by any other person or persons in whose favour I have by my said will made any devise limitation or bequest; their heirs executors or administrators, in or about the supporting and defending my said will and this my said codicil thereto, or any devise limitation bequest clause matter or thing therein respectively contained."

By the Decree made by the *Lord Chancellor*, on the hearing of this cause, *April* 18, 1815, it was declared that the legacies of £3000 each to the son and daughters of the testator, and also his funeral expences, were specific charges upon and ought to be paid out of the monies at *Ince* and in the *Liverpool* Bank, and what was due to the testator from the corporation of *Liverpool*, and the amount of the rents and fines due to him at his death; the surplus, if any, to be considered as a specific be-

1815.

BOOTLE v. BLUNDELL.

quest to the said son and daughters, share and share alike; that the bequest of furniture, &c. together with the other personal estate not specifically disposed of, was not to be considered as a specific bequest to the testator's son of the several articles, but that the same formed a part of the general residue; that the personal estate not specifically bequeathed was the primary fund for the payment of the testator's debts; and that the real estates comprised in the term of 500 years limited by the testator's will upon the trusts therein mentioned for the payment of his debts, were only liable to make good the deficiency of such residue.

It was now moved, on the part of the Defendant *Charles Robert Blundell*, the testator's son, to whom the personal estate was so bequeathed, that the minutes of the decree might be varied by declaring that the estates comprised in the term of 500 years were liable in the first place to the payment of the testator's debts, in exoneration of the personal estate.

*Sir Samuel Romilly* and *Roupell*, in support of the motion, stated the question to be, whether the testator had not bequeathed his personal estate to his son freed from his debts, unless it should become necessary to resort to it on failure of the real estate charged with the payment of them; the testator having by his will directed his funeral expences and the legacies of £3000 given to his son and each of his daughters to be paid out of a particular fund, the surplus of which was to be divided among his said son and daughters; and having created a term of 500 years out of the estate devised to his daughters for the express purpose of paying his debts and general legacies; and, lastly, having given all his personal estate not before specifically devised, (enumerating the particulars of which it consisted) to

his son absolutely for his own use. They argued that the testator's intention in making this disposition of his property was clear, that the personal estate so given should be exempt, especially inasmuch as the fund directed to be divided among his son and daughters, after payment of funeral expences and the £3000 portions, was allowed on all sides to be exempt; and said that those who maintained the contrary proposition would have a strange hypothesis to support, namely, that the personal estate given to the son, though consisting of specific articles, was so given subject to the payment of debts and legacies, while the money fund, that part of his property which would be first applicable to the purpose in the regular course of administration, was meant to be exempt from it. An inference was also drawn from the mode of expression used in the bequest of the personal estate, as the personal estate (after enumerating particulars) not *before* specifically bequeathed, which was as if he had said, I now specifically bequeath that which was not before specifically bequeathed; adding, that a considerable stress had always been laid upon the use or omission of the term "residue." And they referred to the judgment of Lord *Alvanley* in the case of *Burton* v. *Knowlton* (a).

*Hart* and *Horne* for the Plaintiffs (the trustees and executors) argued that the rule of the Court, as laid down in all the successive cases from Lord *Thurlow*'s decision in *The Duke of Ancaster* v. *Mayer* (b) to the present time, (namely, that though to exonerate the personal estate it is not necessary there should be an express direction, yet there must be a plain demonstration of intention,) requires that there should not

(a) 3 Ves. 107. See p. 109.

(b) 1 Bro. 454.

1815.

BOOTLE v. BLUNDELL.

merely be some intimation in the will of an intention to exonerate, but that that intimation must be so plain and direct as not by possibility to be mistaken; and adverted particularly to the words of the *Master of the Rolls* in his judgment on the case of *Watson* v. *Brickwood* (c). That the appointment of the same persons to be executors, who were also constituted trustees of the 500 years' term, was a strong circumstance to shew that the term so given was only meant to be auxiliary to the personal estate. That, although something might be inferred in the shape of intention, from the clause directing the sum of £300 to be raised by way of legacy out of the rents and profits of the devised estate for every new trustee of the term of 500 years to be substituted in the place of trustees dying or declining to act, yet it was not such plain intention as not to be mistaken, which alone suffices to exonerate. Then, with regard to the argument from the enumeration of articles preceding the words "personal estate," that falls to the ground when it is compared with the clause immediately preceding, in which the testator has already severed from the bulk of his personal estate all those articles which are most valuable or rare, consisting of pictures, statues, marbles, &c. and, by the very care which he takes to preserve those articles entire, evinces his disposition as to the articles not so preserved, that they should go and be considered as applicable to the purposes to which the personal estate is generally applicable. That it was further evident, the testator did not mean that his personal estate should be freed from every burthen, by his having directed the costs attending the removal of the articles given to Mrs. *Aspinwall* to be paid out of the personal estate, notwithstanding he had just before

(c) 9 Ves. 447. vide p. 453.

created the term of 500 years for the purposes in the will mentioned. That the omission of the word "residue" is nothing, provided the words used amount to a general description of personal estate, which these words do, the enumeration of articles, although unnecessary, being only to distinguish them from those already set apart; that such introductory words as those used to precede this general bequest are such as have occurred in a variety of cases where the Court has held that a mere enumeration of particulars is not sufficient to constitute a bequest specific; and that the last clause, directing the executors to enter his dwelling house and search his drawers and closets and take into their custody all the money they may find there, affords further evidence that he meant all those monies to pass through their hands, as executors, and to be applied in the regular course of administration. That the circumstances from which an intention to exonerate might have been inferred in *Watson* v. *Brickwood*, and also in the case of *Tuitt* v. *Lord Northwick* (a) were much stronger than in the present; though in the one case the present *Master of the Rolls*, and in the other the Lord Chancellor *Loughborough*, held that the personal estate was not exempt, for want of that plain and manifest intention which alone can warrant a departure from the general rule.

The legacies (with the exception of the £3000 portions,) were admitted to be charged on the term of 500 years as a specific fund for the payment of them. But the payment of the debts rests altogether on a different basis; and for this reason, that the creation of the legacies, as well as of the fund for the payment of them, is altogether the act of the testator: and, if there

(a) 4 Ves. 816.

1815.

Bootle v. Blundell.

be found any indication, however expressed, that the legacies shall be chargeable on a particular fund, there can be no reason for resorting to any other fund for the payment. But, with respect to debts, the case is different; the Court there dealing with a charge existing antecedent to and independent of the will, thrown on the personal estate by the regular operation of law, and from which, if the personal estate is to be exonerated, it must be by words which satisfy the Court that such was the intention of the testator.

It was then urged that, as to the words "not before specifically bequeathed," the natural inference to be raised from them was directly the reverse of that attempted to be established; that, in this case, the legacy of £3000 to the son being made payable out of a specific fund was absolutely inconsistent with the notion that he was to have the general personal estate also as a specific legacy; that, supposing the testator intended to give no protection to the general mass, it was quite reasonable that he should endeavour to protect a certain portion, but not so if the intention was that the whole should be protected; that, as a general rule, cases of this description are not to be decided by minute verbal criticism on particular passages, but by the intention to be collected from the whole will taken together; and that particular clauses, though they might be called in aid of the general intention, could not be resorted to for the purpose of picking out some apparent meaning adverse to the construction so established.

*Blake*, for Defendants in the same interest with the Plaintiffs, referred to *Brydges* v. *Phillips* (a);

(a) 6 Ves. 567.

in support of the proposition, that the debts and legacies, in this case, stand upon a totally distinct foundation, legatees claiming only under, whereas creditors claim independently of, the will. He considered the specific bequest to the son, of one third of the residue of the fund appropriated to payment of the funeral expenses and £3000 portions, to be inconsistent with the supposition that the general residue was to pass specifically without being subject to the payment of debts; for that the residue of that particular fund would pass in the general residue, and no motive could therefore be assigned for the former bequest, except that the testator considered the general residue liable to the payment of debts, and wished to exonerate this particular residue. In reference to the peculiar provision of the codicil, he contended, that if the testator had intended to make his bequest of the personal estate specific in favour of his son, it was natural to suppose that he would still have charged that with the payment of the costs of disputing his will, in preference to the real estate devised to his son; and that, from his not having done so, it must be inferred, that he did not consider that bequest as specific; and that the term of one thousand years, vested for the purpose of defraying these costs, was only meant to be in aid of the personal estate, the same not being bequeathed specifically.

1815. BOOTLE v. BLUNDELL.

*Bell*, (for other parties in the same interest,) observed, that the principle as laid down in *Watson* v. *Brickwood* is not to be departed from; and that, although there was great nicety of construction in all cases of this nature, he nevertheless conceived the proper meaning of manifest intention to be, such as would satisfy the mind of any

*Nov.* 25.

1815.

BOOTLE v. BLUNDELL.

person of plain and ordinary capacity, not possessed of technical legal knowledge, that a testator, also ungifted with a knowledge of the forms of legal expression, meant, in reality, what is contended to be the fair construction of his will. That, if the question were to be tried by the touchstone of each particular decision that had gone before it, depending on facts and circumstances altogether different, that would not bring us one iota nearer the true conclusion. He therefore contended that, in every case, unless the judge can satisfy himself of the actual intention, the rule of law must prevail; for that, where there is an ascertained general rule, and the question is whether any particular case forms an exception to it, it is necessary there should be the most positive grounds on which to constitute it such an exception. In the present case, he insisted there were many circumstances to shew that the testator did not mean his personal estate to be exempted; but that, the burthen of proof lying entirely on the other side, it was sufficient to say, that if, in point of circumstances, the scale balances, the rule of law must come in with an irresistible weight to make it preponderate on this side.

Upon the creation of the term for five hundred years, in trust "out of the rents and profits" to pay the debts, &c. he insisted that, where a term is created for this purpose, it has in every case been considered as only in aid of the personal estate; the words "rents and profits" being restrained to their *natural* meaning of "annual rents and profits;" which, as they would be inapplicable to the payment of gross sums at certain fixed periods, must therefore be taken only in an auxiliary sense (*a*).

(*a*) See on this subject *Allan* v. *Backhouse*, 2 Ves. & B. 65. and the cases there collected.

Then, in the present case, the principal charges upon this term, independent of the debts, are by way of annuity; a sort of payment to which the annual and accruing rents and profits are particularly applicable: and it is a further confirmation of his intention that these should constitute the fund to be so applied, that he has given to the annuitants the power of distress in default of payment. But the debts cannot be so paid: what follows then, but that he meant the debts should be first paid out of the personal estate, and only by way of security to his creditors that, if the personal estate should be insufficient to pay all, the remainder should be left as a charge upon this term of years, to be kept down out of it in like manner with the annuities?

With regard to the enumeration of specific articles preceding the words "and other my personal estate," he referred to the numerous class of cases in which sweeping words at the conclusion of such a clause had been restricted to mean articles *ejusdem generis*; but here the argument was put in a different shape, it being said, that because the testator had given these specific articles, "and all other his personal estate," those general words must not only not be restricted to articles *ejusdem generis*, but being allowed to operate to the full extent of their meaning, those which precede must give to the whole bequest the effect of a specific legacy; which was a construction too repugnant to all precedents to be maintained.

*The Lord* CHANCELLOR,

In the course of the argument, observed, that he was unable to arrive at any satisfactory result with respect to the meaning of the terms *manifest intention*, and *necessary implication*, so often used to

1815.

BOOTLE v. BLUNDELL.

denote the degree of certainty that ought to operate on the mind of the Judge in deciding the personal estate to be exempt from the payment of debts. He further remarked on the great uncertainty and contrariety of all the decisions, so strongly exemplified in the case of *The Duke of Ancaster* v. *Mayer*, where, when three Judges had concurred in declaring that they saw a manifest intention to exempt the personal estate, Lord *Thurlow*, coming after them, decided on his own opinion, (the opinion of one against three,) that no such manifest intention appeared. In remarking on the different clauses in the will, as they were introduced to his notice, his lordship dwelt particularly on the passage in which the costs of removing the articles of furniture given to Mrs. *Aspinwall*, are directed to be paid out of his *said* personal estate, and also on the bequest of the monies at *Ince*, and in the *Liverpool bank*, &c., enquiring whether the mere fact of its being a specific bequest rendered it exempt from the payment of debts as contra-distinguished from the bulk of his personal estate, and observed that he had not been able to discover how it came to be first established, or when, in particular, the court first saw, that there was a manifest intention to exonerate personal estate in the circumstance of its being specifically given. The circumstance of the Testator having described the gentlemen to whom he had given the term of five hundred years as "trustees *and* executors," in the clause immediately following that devise, was also noticed by his lordship, as being one upon which great stress had been laid by several of the judges who had come before him.

*Sir S. Romilly*, in reply.

Upon looking through the cases, I cannot find the principle any where laid down so strongly as is contended on the other side, with respect to the degree of

1815.

BOOTLE v. BLUNDELL.

certainty required in the manifestation of the Testator's intention. I can find, indeed, that there must be an express direction, or, for want of such direction, a manifest intention, to exempt the personal estate; and I find also, that in the case of *Watson* v. *Brickwood*(a), the Master of the Rolls expressed his regret that any thing should ever have been admitted so to exempt it, short of express direction. But, with the greatest possible respect for the opinion of that Judge, I cannot discover upon what principle it is to be supported, or why the plain intention of the Testator, without any positive direction, should be excluded from its operation in the construction of a will with reference to this particular question, rather than with reference to any other, on which the inference of intention is always allowed to prevail. I am ready to admit that the question whether there is or is not evidence of such an intention, is one that cannot be decided by authorities, and that there is no decision to be found in the books which is applicable, in all its circumstances, to the present case, or to any other, except that individual case upon which it was founded. From all the cases that have been now cited, and from so many more as it would be easy to add to their number, what can be extracted but the bare abstract principle, which is, that this bequest of the personal estate is a legacy to be governed by the same rules as are applicable to all other legacies?

In the present case, it is admitted that neither the funeral expenses, nor the legacies, are payable out of the personal estate. Now, the fact that the legacies are not payable out of the personal estate, is a strong, though not a decisive circumstance, to shew that the Testator did not intend his debts to be paid out of the

(a) 9 Ves. 447.

1815.
BOOTLE v. BLUNDELL.

personal estate. But the circumstance of the funeral expenses is still stronger, because the personal estate is as much the natural fund for the payment of the funeral expenses as of the debts, and the only ground on which it is admitted that it is exempted from the funeral expenses, is, that a particular fund is constituted for the purpose of discharging them. Yet the testator has not any where said that the funeral expenses shall be exclusively paid out of the fund so constituted. Why, then, may it not be as well said, in the one case as in the other, that the fund so constituted is only subsidiary? Or what reason is there for saying that the debts shall be paid out of the general personal estate, when it is admitted that the funeral expenses are not so payable?

The circumstance of the Testator giving "all other his personal estate," not using the term "residue," is material; for that term necessarily implies that the general personal estate is subject to certain claims; and yet, even the adoption of it does not, in all cases, preclude the intention to exonerate from debts. *Burton* v. *Knowlton* (a). Then, with regard to the enumeration of articles with which that clause is introduced, I must not be mistaken as contending that such an enumeration alone will render a bequest specific, but only that it affords a strong argument in support of the supposition that the testator did not intend the articles so given to be sold for the payment of his debts, many of them being in themselves of importance to the enjoyment of the mansion house and of that very museum of curiosities which he has evinced so strong a desire to preserve; most especially when, in a former part of the will, he has made a specific bequest of money lying by him, and in his banker's hands, which, it

(a) 3 Ves. 107.

cannot be imagined, that he would not have directed to be first applied in payment of his debts, if he had intended *any part* of his personal estate to be so applied. This is an argument peculiar to the present case, which has been taken no notice of on the other side and is indeed incapable of receiving any answer.

In the case of *Hartley* v. *Hurle* (*a*), which was supposed to overturn the authority of *Burton* v. *Knowlton*, Lord *Alvanley* went upon the circumstance that the testator gave to the same person, and at the same time, all the personal estate not before disposed of, and also an estate for life in his real estate, which he had before devised for payment of his debts; and, by coupling these dispositions together, he inferred that it was not intended to exempt the personal estate. In the present case, the contrary inference would naturally arise from the difference of the existing circumstances.

Then, as to the argument that, in the present case, the debts are charged not on the bulk of the real estate, but on the rents and profits of the real estate, that argument signifies nothing "unless rents and profits" can be established, (contrary to the tenor of all the cases), to mean *annual* profits, for which there is no pretence, the debts with which they are charged being gross sums, for the payment of which, I apprehend, it is clear that the Court would order the term to be sold, and that without any reference whatever to the amount (*b*).

There still remains another argument, which is that

(*a*) 5 Ves. 540. In the report of the case, this ground of decision does not seem to be distinctly raised.

(*b*) See *Allen* v. *Backhouse*, 2 Ves. & B. 65.

1815.

BOOTLE v. BLUNDELL.

arising from the provisions made respecting the legacy to Mrs. *Aspinwall*. But, suppose the testator had, in one part of his will, devoted his personal estate to the payment of one particular legacy, so far from the personal estate being charged thereby with the payment of all his legacies, it would, on the contrary, be an argument, by reason of the exception, for exempting it from all but that so specifically charged upon it. However, in this case, the testator has directed these particular expenses to be paid, not out of his general personal estate, (which he had not before noticed,) but out of his *said* personal estate, which can refer only to that part of it which was before noticed; viz. the money at *Ince*, and in the hands of his bankers, &c. But the provision made by the codicil would remove all doubts, if any yet existed. The testator was conscious, that, according to his will, the expenses of litigation, (which are there provided for by the codicil,) would not have been payable out of the general personal estate bequeathed to his son; and, as it was evidently his design that his son should, at all events, be answerable for such expenses, (that being the quarter from which alone any litigation could be expected to arise,) he therefore charges them on the real estate devised to his son. Now, would he have done this if he had apprehended that his son was already liable to the payment as his residuary legatee? Would he have done this if he had not believed that those expenses would otherwise have been a charge upon the term created out of those other real estates, of which his daughters were to have the benefit, subject to the payment of his debts and legacies?

There are other circumstances in this testamentary disposition, from which the intention I am now contending for might be inferred, as strongly perhaps as from those I have already noticed. But your Lord-

1815.

BOOTLE v. BLUNDELL.

ship's attention has been sufficiently drawn to them by the arguments on both sides of the present question. I am well aware that, unless a case were hereafter to arise, similar in all its circumstances to the present, (which is an event morally impossible,) the decision of your Lordship on the present case can establish no precedent whatever. But all that I am anxious the Court should not do in this instance is, that it may not be laid down that the construction of wills with reference to this particular question is to be fettered by stricter rules than those which are applicable to all other questions arising out of them; but that it may, on the contrary, be established, that all which is meant by saying that the personal estate is the natural fund for the payment of debts, applies only to the case where no positive intention can be inferred either on the one side or the other, but is entitled to no weight or operation whatever, when an intention to the contrary is, in any manner, expressed by the testator.

*The* LORD CHANCELLOR.

I shall not defer my judgment on this case beyond the next sitting of the Court, because I cannot, by any consideration given to it, assist my mind, or prepare it for the decision of the question, more than it is prepared already. Yet, I wish to take so much time to compare some of the authorities which it is difficult to reconcile with each other. With what Lord *Thurlow* says, in the case of *The Duke of Ancaster* v. *Mayer* (a), I concur, so far as that, in wills of this kind, the question whether personal estate is liable in the first instance, is, upon looking into the cases, a question so slender and fine, that nothing certain is to be collected

(a) 1 Bro. 454, p. 462.

1815.

Bootle v. Blundell.

with regard to it; but, on the contrary, so much uncertainty prevails, that, could the will of this testator be referred to a number of lawyers, they would probably entertain a diversity of opinions upon it. However, I will now state what I understand to be the general rules on the subject.

Speaking of the old law, Lord *Thurlow* rightly observes, that, according to it, there ought to be express words to exempt the personal estate from the payment of debts; and I fully agree with the *Master of the Rolls*, in wishing that I could have found this to be still the established rule of the Court. But then steps in the secondary principle, that the want of such express words may be supplied by "implication plain," (which last is a phrase borrowed from Lord *C. J. Hobart* (a); and that, if there is such "implication plain," or manifest intention, the Court shall not disappoint, but carry into effect, such intention. Still, the question remains, What is meant by "implication plain," and manifest intention? Lord *Thurlow* says, it implies "irresistible conclusion," an explanation which Lord *Alvanley* reduces to such as will satisfy the mind of the Judge deciding upon it (b). Now, as to the circumstances from which this inference is to be drawn, I agree with all who have gone before me, that it is not enough that the testator has charged the real estate, to shew that he intended to discharge the personal. Then, with regard to circumstances *dehors* the will, which have been sometimes called in to assist in explaining it; (such as the respective amount of the real and personal estate, the greater or less degree of personal favour which the testator may be presumed to have entertained

(a) In the case of *Counden* v. *Clerke*, Hob. 30.

(b) Vide post, where this is treated more at large.

1815.

BOOTLE
v.
BLUNDELL.

towards this or that object of his bounty, and others of that nature;) I apprehend that they ought all to be set aside in the consideration of a question depending on a will, such question being fit to be decided only by an examination of the whole will taken together. It must be by an examination of the entire will; for, if you take any one particular clause of those which have been in other cases relied upon as a ground for inferring intention, it will be found that it is a ground for such inference only so far as it can fairly be pronounced to be so upon reference to the general context. Take, for instance, the appointment of the same person to be trustee of the real estate, and executor: that has been called by some judges a circumstance which shews the intention not to exempt the personal estate. I say, on the contrary, that, whether it is or is not such a circumstance depends entirely upon the context. If I discover, from the beginning to the end of the will, an anxious discrimination between the two characters in which this person is to take under it; if I can trace a most extreme caution that all their costs, sustained in the character of executors, are to be paid to them, not as executors, but as trustees of the real estate, then I must conclude, that, in the will so constituted, the inference of intention, arising out of the union of the two characters in the same individual, fails altogether, by reason of the stronger inference of a contrary intention. Again, some Judges have considered a direction that the funeral expenses shall be paid out of the real estate a strong circumstance to exonerate the personal; for that it is not reasonable to suppose the testator could have meant to exempt it from that which is the primary charge upon it, and yet to leave it subject, in all other respects, to the natural course of law; while others have professed not to see much in that argument, and that the circumstance goes no farther

1815.

Bootle v. Blundell.

in meaning than it does in words, to create a fund for one particular class of expenditure.

All these supposed positive inferences, then, amount to no more than this—that the same expressions, when used in one will, may have a totally different effect from what they would have in another: and I have said so much at present only to shew upon what principles I shall myself proceed in directing my examination of the will of this testator; being satisfied, at least, of this, that I cannot assist the operations of my own mind on the subject by postponing my decision any longer than for the purpose which I have just now stated.

*Nov.* 27.

*The* Lord Chancellor,

The question which the Court is now called upon to determine is, whether, according to the true intent and meaning of this will, collected from the settled principles of the Court, and the rules of law, the personal estate of the testator is to be considered as exempt from the payment of his debts.

In order to determine what are those principles, and those rules, the several cases on the subject have been referred to in the course of the argument; and, on the part of those who contend that the personal estate is not exempted, I am pressed to consider this to be the rule of interpretation; namely, that the intention of the testator to exempt must be manifested in such a manner as that persons out of Court, on reading his will, cannot fail to agree that such was his intention.

1815.

BOOTLE v. BLUNDELL.

Upon looking through the several cases which have been decided during a period of more than a century past, I think I should have been authorized to say, at the commencement of that period, that, if such a rule were laid down, there could never, in all human probability, be any decision upon a will furnishing the solution of this question; and now, at the close of it, I think I am authorized to say, that that which it was then probable would be the fact is the fact; for, on a comparison of all the cases which have arisen, it is scarcely possible to find any two in which the Court altogether agrees with itself; there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention, but it is considered in other cases as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this, (which appers to be a rule supported by all the cases taken together,) namely, that, since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is is sometimes denominated "evident demonstration," sometimes "plain intention," and "necessary implication," to operate that exemption.

Thus much can be collected from the cases; but when you proceed further, and enquire what it is that constitutes this evident demonstration, plain intention, or necessary implication, it does appear to me that Lord *Alvanley* is right when he says, You are not to rest on conjecture; but the mind of the judge must be convinced that he is deciding according to what the testator intended (a). The expression "necessary impli-

(a) Vide *Brummel* v. *Prothero*. 3 Ves. 113, where the *Master of the Rolls* says, "As to the irresistible in-

1815.

Bootle
v.
Blundell.

cation" is frequently applied to cases between a devisee and heir at law; and yet there is hardly a case decided against an heir at law, where the implication upon which it was so decided was of absolute necessity. It is but a loose way of defining this expression to say that the intention must be so probable that the Judge cannot suppose the contrary; and it seems strange to lay down as a rule that express words shall not be required, but yet that there must be expressions tantamount to express words. I take it that this is what will be found to be the result of all the cases; that the Judge is in every instance to look at the whole of the will together, and then ask himself whether he is convinced that it was the testator's intention to exempt his personal estate. Many rules are clear and positive. First, it is certain that in equity, as well as at law, the personal estate is first liable; and that the amount of the personal estate, whatever it may be, makes no difference in the case. That was not so, however, according to the old decisions, as I shall have occasion to point out to you presently. I take it to be certain, also, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged (a). Then, on the question whether the per-

ference, I do not know what is meant by that. I admit it must be such an inference as leaves no doubt on the mind of the person who is to decide upon it. It must be irresistible to my mind. It need not be such that no man alive can doubt upon it; but it must not be a case of presumption, for then we shall get into that miserable way of explaining it by evidence."

(a) Vide *Aldridge* v. *Lord Wallscourt*, 1 Ball & Beatty,

1815.

BOOTLE v. BLUNDELL.

sonal estate is discharged or not, I apprehend it will be found that the very same circumstances have, in the minds of different Judges, led to different conclusions. And this is the result to be drawn from the most diligent comparison of all the cases.

It is not my intention to go through all these cases at present. In that of *Lord Inchiquin* v. *French* (a), or, as it is named in a MS. note which I have seen, and which concurs with the printed report, *Lord Inchiquin* v. *O'Brien*, Lord *Hardwicke* enters very fully into almost all the antecedent cases, and lays down the rules of this Court, as to the construction of wills, with reference to this subject, very much as I have stated them. In *Stapleton* v. *Colville* (b), which was there cited as a case in point, Lord *Talbot* says, "The single question for the judgment of the Court is, whether the personal estate shall or shall not be liable to the payment of the testator's debts. What the *quantum* of the debts, or the amount of the personal estate was at the testator's death, does not appear; if it did

312. *Tower* v. *Lord Rous*, 18 Ves. 132. Even this, however, it is apprehended, must be taken to be true only as a general proposition; for, as the *Master of the Rolls* says, in the case of *Hancox* v. *Abbey*, 11 Ves. 186, "The real estate may be so appropriated to the payment of *a debt* as to shew a clear intention that it shall not be a burthen on any other fund, though an intention to exonerate the personal estate is not in any other way expressed." As where the direction is to apply a particular portion of the real estate for the payment of one particular debt.

(a) Ambl. 33. 1 Wils. 83. A much fuller note of this case has been lately published by Mr. *Cox* in the 1st Volume of his Cases in Chancery, p. 1.

(b) Forr. 202.

it would give a great light into this matter." From which passage I infer Lord *Talbot* to have been of opinion that in almost every case the *quantum* of the personal estate is fit to be inquired into. But this was not the opinion of *Lord Hardwicke*, who says, on the contrary, in *Lord Inchiquin* v. *French* (*a*), that the circumstances of the testator are not to be taken into consideration for the purpose of determining what was his intention, taking the singular distinction, however, that the bequest in that case was not of the personal estate, but of the residue after payment of debts and legacies; leaving it to be inferred that in cases where the bequest is of the personal estate itself, or of particulars enumerated which constitute the personal estate, it was his opinion that in such case the amount would form a proper subject of inquiry.

In the case of *Walker* v. *Jackson* (*b*), (on which Lord *Thurlow* commented in *The Duke of Ancaster* v. *Mayer* (*c*) much more at large than appears by the report in *Brown*;) Lord *Hardwicke* was of opinion that the personal estate was exempted, under the circumstances. Here was an estate in the county of *Lincoln*, given by the testator to be sold by his executrixes for payment of his debts, legacies, and the expense of his funeral, which is left to their discretion; and he then appoints his executrixes. This circumstance, viz. that the same persons have to deal with the real that have

(*a*) Amb. 40. 1 Cox, 8, 9. See also, *Ancaster* v. *Mayer*, 1 Bro. 466. *Brummel* v. *Prothero*, 3 Ves. 113. *Aldridge* v. *Lord Wallscourt*, 1 Ball & Beatty, 315.

(*b*) 2 Atk. 624. 1 Wils. 24. Bunb. 302.

(*c*) 1 Bro. 454.

to deal with the personal estate, is one which occurs in several of the cases on this subject, and on which considerable stress is laid as affording ground against the exemption of the personal estate (*a*). Accordingly, Lord *Hardwicke* says that, if the testator had rested there, the personal estate would have been applicable to exonerate the real. But then comes the codicil, giving to his executrixes all his personal estate not before devised; and, upon this, his Lordship observes that "a stronger circumstance cannot be than the republishing his will, and an alteration from what it was before; and, unless it is construed to be his intention to exempt his personal estate in favour of the executrixes, the words are fruitless and vain, and do no more in their favour than the will as it originally stood would have done before;" therefore concluding that "these words can have no other signification than to exempt his personal estate (*b*)."

The observation made upon this by Lord *Thurlow* in the case of *The Duke of Ancaster* v. *Mayer* (*c*), was that the very circumstance here laid hold of to shew that the personal estate is to be exempt is a circumstance on which other Judges presiding in this Court have relied as affording the contrary conclusion. He says that Lord *Hardwicke*'s reasoning on this point is far from being sound reasoning; and re-

(*a*) In *Burton* v. *Knowlton*, 3 Ves. 108. Lord *Alvanley* says, "The circumstance that the trustees *are not* the executors affords a strong inference as to the real intention, *and is always favourable to the exemption of the personal* estate."

(*b*) 2 Atk. 627.

(*c*) His Lordship here referred to a MS. note of the case in his own possession.

1815.

Bootle v. Blundell.

fers to *Stephenson* v. *Heathcote* (a), observing that he entirely concurred with the principle there laid down, *viz.* that the gift of personal estate to one who is appointed executor is not to be considered as a legacy exempt from the payment of debts; and then adds that there are twenty cases in this Court where the circumstance of giving to the executors has been turned to a purpose directly contrary to the use which Lord *Hardwicke* makes of it in *Walker* v. *Jackson*. For this reason, he concludes that the notion of deciding by precedent in questions of this nature must be abandoned; and that the Court must, in every such case, abide by the clear intention; which, indeed, all Judges affect to go upon, but seldom agree upon the principles to be applied in collecting it.

The case of *Stephenson* v. *Heathcote* illustrates what Lord *Thurlow* says. It came on in *Hilary Term*, 1758, before Lord Keeper *Henley*, and was this. *John Harpur* by his will devised all his lands and hereditaments (except his lands at *A.*) to his wife (the Plaintiff,) her heirs and assigns, in trust, by sale, to raise so much money as would fully pay and satisfy, (which word, *fully*, was considered by the Lord Keeper in his judgment, and has elsewhere been thought, to be a word of much signification,) and discharge his debts and funeral expenses (b). All the residue of his said

(a) Cited in 1 Bro. 458—466.

(b) The words of the will, appearing from the register's book, are these. "In trust by sale of so much and such parts of the said premises as should be sufficient to raise money to pay all debts and funeral expenses." The word "fully" was probably supplied from the will itself, which appears not to be literally stated on the pleadings.

1815.

Bootle v. Blundell.

real estate (except as aforesaid) he gave to his said wife for life, and after her death to his heirs begotten on her body, and for want thereof to the defendant for life, with remainders over. He gave to his uncle his silver tobacco-box, and all the residue of his personal estate whatsoever to his said wife for ever, and appointed her sole executrix of his will. Upon this will there arose three questions; the first of which was raised by the widow, who claimed the whole personal estate, exonerated from the payment of debts and funeral expenses; and upon this the Lord Keeper said that, in the construction to be put upon wills, no doubt the Court is bound to find out the intention of the testator, if it be possible to do so, however inartificially the will may be expressed; but then, that this must be done from the words of the will itself, and not from circumstances out of the will; and also according to general principles and established rules, and not on conjecture of the intention formed from what it may be imagined a man would do in the testator's circumstances. He said that we are not to enquire into the amount of the personal estate, whether it be or be not sufficient to pay the debts; because that would be to establish a general rule that, wherever the personal estate is insufficient, it must be presumed to be the testator's intention to charge his real estate with the payment of *all* his debts. That, in the present case, the testator, having constituted his wife trustee of the real estate for payment of his debts, appointed her also to be his executrix; but that, although he had given her a power to sell his real estates, "*fully* to pay and satisfy his debts," this was no more than making his real estate auxiliary to the personal, according to the rule of law, that the personal estate must be first applied, unless it appears to be the testator's clear intention to exempt it and to throw the debts wholly on the real

1815.

BOOTLE v. BLUNDELL.

estate. That it is not necessary, however, for the testator to use express words for this purpose, to shew his intention: if he uses expressions tantamount, it is sufficient. But, in this case, it could not have been the intention. That the last clause, where he gives the tobacco-box to his uncle, and the rest of his personal estate to his wife, had been used, indeed, as an argument that his intention was to make the land the primary fund; but, unfortunately for that construction, the clause did not end there; nor did it go on to say, (as it should have done if that had been the intention,) "for her own use;" but, instead of that, the testator added, "whom I make my executrix," thereby shewing that he meant a trust. The manner of this disposition, he added, was a strong argument with him to shew that the testator's principal object was a provision for the children whom he might have by his wife, whom he cannot be supposed to have so far preferred to those children as to have given her the whole personal estate, free from the payment of debts, and throw the entire burthen of them on the estate, to which he intended that they should become entitled after her decease (a).

Lord *Thurlow* considered, in the case of *Ancaster* v. *Mayer*, that it made no difference whether the personal estate was given to an individual or not, in express terms, if that individual is nominated executor; since, as executor, he must, in either case, take it sub-

(a) The *Lord Chancellor* cited the judgment in this case from a MS. note in his possession. The Reporter has been favoured with the sight of another MS. note of the same judgment, which, though less full than his Lordship's, corresponds with it exactly in all the leading circumstances.

ject to the claims of those who are beneficially interested. And Lord *Northington*, in this of *Stephenson* v. *Heathcote*, seems to be of the same opinion, though he could not have been ignorant of Lord *Hardwicke's* then recent decision in the case upon which we have already commented (*a*).

In *The Duke of Ancaster* v. *Mayer*, as in many of the preceding cases, very considerable stress was laid on the circumstance of the persons who were appointed executors being the same to whom the real estate had been before devised as trustees. In other cases this circumstance is considered as less material; but the degree of weight to which it is entitled depends upon the whole of the will taken together; and, if a distinction is to be discovered, from the beginning to the end of the will, between what they are called upon to do in the character of executors, and what as trustees; and, if he directs them, as trustees, to do that which is properly the duty of executors, this is a circumstance which deserves also to be attended to, in determining what is the manifest general intention of the testator.

The case of *The Duke of Ancaster* v. *Mayer*, was as follows. (See the report in 1 Bro. 454.)

If, in that case, the mortgage debt of £6500 upon the leasehold estate devised to the testator's brother, had been a debt of the testator's own, it seems to be very certain, from *Serle* v. *St. Eloy* (*b*), and other cases which have been cited, that his giving that leasehold estate, subject to the mortgage, would not have con-

(*a*) The case of *Walker* v. *Jackson*, ub. sup.

(*b*) 2 P. Wms. 386. *Galton* v. *Hancock*, 2 Atk. 437. *Astley* v. *Tankerville*, 3 Bro. 545. 1 Cox, 82.

1815.

BOOTLE
v.
BLUNDELL.

stituted it the primary fund for payment of that debt. However, it turned out, upon enquiry, that this £3500 was not the debt of the testator. Then follows the clause by which he gives to his said brother "his household goods, and all other his goods, chattels, effects, and personal estate, whatsoever and wheresoever," if he should be living at the time of the testator's death; on which words a great deal of argument might have been raised as to the distinction between a gift of residue, as residue, and a bequest of enumerated particulars, followed by the words "and personal estate whatsoever," not "and all the residue of my personal estate." This argument was, however, put out of question in that case, by a subsequent clause, in which he expressly refers to this, as "the devise of the residue of his personal estate." After this follows the clause appointing executors; and here, former cases had suggested a distinction, as being of some weight, between a term created for the payment of debts only, and for the payment of funeral expenses, legacies, and annuities, as well as debts. What does this testator direct? (See the clause in question, 1 Bro. 455.) Now, when this case came on before the Lords Commissioners, they were of opinion that there was a sufficient manifestation of intention to shew that *Montague Bertie*, (the testator's brother,) was to take, exempt from payment of debts: but Lord *Thurlow* thought otherwise; and most particularly laid hold of this concluding clause, as affording the manifestation of a contrary intention; because, instead of only directing his trustees to raise a fund for payment of his funeral expenses, debts, and legacies, he appoints the same persons his executors, and after directing them to pay his funeral expenses, debts, and legacies, "by such methods, ways, and means, as they shall think meet," he adds, that it shall be lawful for them to retain to them-

1815.

BOOTLE v. BLUNDELL.

selves "all disbursements, expenses, and charges," in [prov]ing his will, either out of the personal estate, (which they were to hold as executors,) or out of the term devised to them as trustees; the testator himself thereby shewing that he designed no preference of the one fund over the other, as applicable to those purposes; and hence Lord *Thurlow* inferred, that, as trustees and executors, they were left to deal with both funds according to the general rule of law in the administration of assets. Upon the whole, the result of that case was this, viz. that the leasehold estate was to pay its own debts; that the personalty was to be the primary fund for payment of all the remaining debts; and the trust fund to come in aid only in the event of the personal estate being insufficient for that purpose.

Afterwards came the case of *Tait* v. *Lord Northwick* (a), before Lord *Rosslyn*, and the cases at the Rolls, before Lord *Alvanley* (b).

In *Tait* v. *Lord Northwick*, there were no circumstances from which Lord *Rosslyn* found it possible to infer the intention to exempt the personal estate; and, in the first of those cases before Lord *Alvanley*, I am not sure that the intention is quite so clear as the *Master of the Rolls* takes it to be. But it lays down the rule, that, in cases of this description, the Court is neither to go altogether by conjecture, nor to require the intention of the testator to be so clear that no man living can doubt his meaning; Lord *Alvanley's* expression being, that "if his own mind was convinced that

(a) 4 Ves. 816.

(b) *Burton* v. *Knowlton*, 3 Ves. 107. *Brummel* v. *Prothero*, ibid. 113.

1815.

Bootle
v.
Blundell.

such was the intention of the testator, he was bound so to declare it."

Then it comes to this—Upon each particular [illegible] as it arises, the question will be, Does there appear, from the whole testamentary disposition taken togeth[er], an intention on the part of the testator, so expresse[d] as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal? For, it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided.

In this place, and before I proceed to a more particular consideration of the provisions made by the present testator, I shall observe that there is hardly a circumstance occurring in this will on which there has not been a great deal of judicial comment in other cases, and from which opposite inferences have not been raised, respecting the question of intention. I shall also repeat, what I have already noticed, that the cases of *Stephenson* v. *Heathcote*, and *Ancaster* v. *Mayer*, furnish us with the concurrent opinions of Lord *Northington* and Lord *Thurlow*, that, if in the first of these two cases, the wife had not been appointed executrix, she would have taken the personal estate exempt from the payment of debts. Likewise I shall say that I have read the case of *Watson* v. *Brickwood* (*a*), and think it was rightly decided, taking the will and codicil together; but if, in that case, the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do

(*a*) 9 Ves. 447.

not occur either in the judgment or in the arguments: still, I repeat that I think that case was rightly decided.

In the case now before the Court, the testator, after directing his funeral expenses to be paid, generally, gives to his son and his two daughters, £3000 each, to be paid to them respectively *by his executors*. (And it is observable, that, throughout his will, he never uses the term *executors*, but with reference to his personal; nor the term *trustees*, but with reference to his real, estate.) In case of the death of his daughters, or either of them, he directs their respective legacies to go to their children, "share and share alike." He then directs his "said funeral expenses and legacies," to be paid out of certain specific funds, the surplus of which, after payment thereof, he gives to his said son and daughters, share and share alike, or their respective issues, as before; directs the shares of his daughters to be to their own separate use; and concludes, as to that part of his will, with these words, "I hereby declare, I have already disposed of certain sums of money, and securities for money, which I lately had by me;" referring to the funds so appropriated.—Now, generally speaking, the personal estate is not only the primary fund for the payment of debts, but also for the payment of funeral expenses, and of such legacies as are not made payable out of a specific fund. But, at all events, it constitutes the primary fund for the payment of the funeral expenses.

The testator then goes on to constitute certain parts of his real estates, (viz. the *Lostock* estate,) a provision for his two daughters and their respective issue, but subject to the trusts of a term of five hundred years, created out of the said estate, "for payment of his debts, and of such annuities and legacies as therein-

1815.

BOOTLE
v.
BLUNDELL.

after mentioned." Now, many of the cases will be found to turn upon an argument, that, even where legacies "thereinafter given," are made payable out of a particular fund, that direction is confined to legacies given by the will, and the general personal estate is still liable to such as are given by codicil or by any subsequent instruments; and this testator seems to have been aware of that, expressly adding to the words "hereinafter mentioned," "or which I may hereafter specify in any codicil or instrument in writing, under my hand." "And, in the first place," he gives to each of his grandchildren, by his said daughters, the sum of £1000, "to be paid into the hands of their respective fathers;" and to each of his "trustees," £300, for his trouble. These trustees are also executors, which, although generally speaking an argument against the intention to exempt, may, under peculiar circumstances, be in favour of that intention. Here, the sums of £300 a piece which are given to them, as this will is constituted, can only be payable out of the real estate, that being the fund appropriated to their payment; and this is a circumstance worthy of particular attention. Then the further trusts of the term are declared to be for the payment of certain annuities, which are very numerous, and amongst which occurs one to a Mrs. *Aspinwall*, upon which I shall have to remark hereafter.

Then, it is asked, could it be the meaning of this testator to delay his creditors and legatees, so as to make them obtain payment of their debts and legacies only out of the rents and profits as they shall accrue? If I were asked this question any where but in Westminster-hall, I should answer in the affirmative, that, by *profits*, he probably meant *annual profits* only; but I have understood it to be a settled rule, that, where a

term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that the gross sum should be raised, the expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself, by sale or mortage(a). Now, that this testator meant his legacies to be raised and paid immediately, is clear; those which are given to the infants being expressly made payable into the hands of their respective fathers. The Court also will not, in order to evade the distinction, go into an enquiry whether the estates, in each particular instance, are of greater or less annual value. I allow that there may, in particular cases, be a great difference between debts and legacies, the latter owing their existence to the will, while the former exist independently of it. But where the testator is making a provision, in the same clause, for the payment of both together, the natural inference is, that he intends both shall be paid in the same way.

Then comes the clause that his trustees shall not be liable, in respect of any losses incurred in the execution of the trusts reposed in them, and charging their expenses on the estates so given to them. And here the testator adverts to the double character sustained by these gentlemen, calling them his "trustees and executors;" and the expenses for which he provides them this indemnity, are those which they may sustain in either capacity. If they had been such as should arise out of the administration of the personal estate only, it might be said that this charge was only meant in aid of the personal estate, which is the natural fund. But the expenses incurred, as trustees, in the performance

(a) Vide *Allan* v. *Backhouse*, 2 Ves. & B. 65.

1815.

BOOTLE v. BLUNDELL.

of the trusts of the real estate, could never be a charge on the personal, unless so expressly constituted; and here the whole expenses incurred in both characters are so blended together as to make it impossible to say the testator could have meant that the costs of the real estate should be paid out of the real estate, but that the costs of the personal should not be paid in the same manner, except in the case of a deficiency of the personal estate. This, therefore, is a strong argument that the testator intended the whole of these costs should be a charge on the estate so devised, in exoneration of the personal.

Then follows the direction for cesser of the term thus created, so soon as all the trusts thereof shall have been satisfied, and the charges and expenses incident thereto discharged; and, after the devise to his daughters and their respective issues, "subject to the said term, and to the trusts thereof," comes the direction that the person or persons for the time being entitled by virtue thereof shall not be let into possession until after payment of all the debts and legacies, and such security given for the due payment of the annuities and of all expenses as shall satisfy the said annuitants, nor until all expenses incurred in the execution of the said trusts respecting the said term, *and* of his will, should have been fully paid. The testator, then, has directed that his funeral expenses shall not be paid out of his general personal estate: he has directed that the costs of performing the trusts of his real estate, shall be paid out of the rents and profits of the estates devised: lastly, he directs that the persons respectively entitled under his will, shall not be let into possession of the devised estates until payment of all debts and legacies and security given for payment of the annuities. That is, security is to

be given at the time of their being let into possession, when, if the personal estate is not exempt, it must be taken to have been already fully administered.

A clause is next introduced deserving of some attention: it is that which provides, that, in case of either of his trustees of the term of five hundred years dying, or declining to act, the new trustee to be appointed in his room shall receive the sum of £300 out of the rents and profits of the estates comprised in that term. But the trustee so appointed would not be an executor, whence it may be inferred that the sum of £300, before given to each of the trustees who are also executors, was given to them in like manner for their trouble as trustees, and not as executors.

The testator proceeds, in the next place, to devise certain other real estates to his son for life, with remainders over; and the estates so devised are not charged with the payment of any debts or legacies whatever. Then he directs certain specific parts of his personal estate, which he wished to be preserved, to go as heir-looms, with the last-mentioned real estates; and the view with which this clause is introduced, (viz. that these particulars, consisting of valuable pictures, statues, and marbles, should be kept together, as objects of public curiosity,) sufficiently accounts for their being set aside from the rest of the personal estate, given to his son, without resorting to the supposition, that it was merely to exempt them from the debts and legacies, to which it would then follow of course that the remainder was meant to be liable.

He then gives his lead-mines in *Flintshire*, (whether consisting of real or personal estate does not appear,) to Mr. *Talbot* and to Mrs. *Aspinwall*, (already named

1815.

BOOTLE
v.
BLUNDELL.

as an annuitant,) certain specific articles of furniture, &c. which he directs to be removed, "at the expense of his said personal estate." Now, there had not before been any mention of personal estate, as such, in any part of the will; and, if the word "said" is not to be rejected altogether, (which it should not be, without the Court being satisfied that there is no meaning capable of being attached to it,) it must be meant to apply to some fund already given; if, on the contrary, the word is to be rejected, what is the inference to be drawn from that rejection? Not that because the testator has charged his personal estate with the costs of removing these specific articles, he must therefore have intended that it should also be liable to the payment of his debts and legacies; for that is a conclusion that by no means necessarily follows.

Then comes the clause giving to his son the personal estate not specifically disposed of. With regard to the peculiar wording of that clause, I am aware that many of my predecessors have laid down a distinction where the bequest is of the residue of the personal estate, and where it is of personal estate, either simply, or following an enumeration of articles constituting items of such a description as to render it improbable that the testator meant them to be applied in payment of his debts. What may be the worth of the argument arising out of this distinction I will not take upon myself to determine; but, when I see my Lord *Alvanley*, for instance, laying a considerable stress upon it, while other Judges who have preceded me appear to consider it as of no value whatever: all that I can say is, that it is a circumstance deserving of just so much weight, and no more, in the mind of any individual Judge, as he can at the time bring himself to

consider it is fairly entitled to (*a*). On the other hand, the son being made tenant for life of a part of the real estates, with remainders over to his children and their issue, this has been alleged as a reason why it could not but be intended that he should take the personal estate exonerated from the payment of debts (*b*). But this, also, is an argument which it is proper to look at as having more or less weight, after attending to the general effect of the will in all its parts, taken together; and, after all, the question is not what the testator really meant, (which can never be ascertained,) but what he has authorized the Court to say, it is probable was his meaning. The words here are, "the furniture of my house, my wines, horses, cattle and carriages, plate, and other my goods, chattels, and personal estate not hereinbefore specifically disposed of, or which may hereafter be disposed of, by me."—When I first read this clause, it did occur to me that the words "not specifically disposed of," might be taken as excluding the idea of this being a specific bequest to the son; but then, again, it being "not *hereinbefore* specifically disposed of," that inference is not a necessary one; it may mean as well, "not specifically disposed of *to others*."

Then, lastly, it is his will, that, immediately after his decease, his said executors should enter his dwelling-house, and search his closets and private drawers, and take into their custody, (among other things,) "all his monies," which monies, it will be remembered, had before been constituted, (together with

(*a*) Vide *Webb* v. *Jones*, 2 Bro. 60.; much more correctly reported in 1 Cox, 245. *M'Cleland* v. *Shaw*, 2 Scho. & Lef. 558.

(*b*) Vide *Tower* v. *Lord Rous*, 18 Ves. 139.

1815.

BOOTLE v. BLUNDELL.

those in the *Liverpool* bank,) a specific fund for the payment of general expenses, and the legacies of £3000.

Then he makes his codicil; and here, after having by his will given his daughters the *Lostock* estate in the manner I have already pointed out; and, after having given to his son the *Lydiate* estate for life, and also his personal estate, (either exempt from, or subject to, the payment of his debts, as the result may prove,) he takes up the consideration of this will being disputed after his death. Now I have no doubt whatever that his idea was, his son might dispute it; however, this he has not expressed; he has only provided that all costs incurred by his trustees and executors, in supporting his will, shall be charged upon, and paid out, of the *Lydiate* estate before devised to his son, and created a term of one thousand years in the same estate, for that especial purpose.

Now it has been argued, that, if there were no circumstances in the will that afforded a ground for saying, the personal estate should be exempted, this codicil would be a sufficient manifestation of the intention to exempt it: this I doubt, but I nevertheless think that it deserves great consideration, as coupled with the provisions of the will. The effect of this codicil is such, as, it is probable, the testator himself did not contemplate. It connects itself, indeed, with the entire will; for, if any one of the numerous provisions of the will should be disputed by any person whatever, it directs that the expenses of litigation shall be defrayed, not out of the personal estate, which is the natural fund, but out of this portion of his real estates before devised to his son. Now, we have seen that he had by his will devoted another part of his real estates to the payment, not only of his debts and annuities, but of the

costs of his trustees and executors, both as trustees and as executors; and, on looking through the precedents, it is impossible to deny that this is a circumstance on which great stress has always been laid; namely, where the real estate is made liable to the payment of such expenses as exclusively regard the administration of the personal estate, such as the costs of probate, and other costs sustained in the execution of the will. All these circumstances not only occur in the present case, but are considerably strengthened by the very peculiar precautions of the codicil.

It is on these grounds that, after all the attention I have been able to give to this case, I feel convinced that the testator did not intend his personal estate to be subject to the payment of his debts. In saying this I do not mean it should be inferred that it is, in my opinion, impossible that other judges, after looking through the cases with the same attention that I have done, might come to a conclusion respecting this will, the reverse of that which I have come to. On the contrary, I hold that a difference of opinion will always be unavoidable in cases of this nature, unless they were brought back to the old rule that nothing but express words should have the effect of exempting the personal estate. Yet although, with all the respect that is due to those who have gone before me, and to the results of their deliberations on the arguments suggested to their notice, I shall never be able to reconcile them so as to satisfy myself entirely with regard to the grounds on which they have built their decisions, I am able to say, that, in the present case, I am convinced the meaning of this will was that which I have stated it to be.

1815.

Rolls.
*Dec.* 1.

## NEWMAN and Wife *v.* KENT and Others. (*a*)

Devise to *A.* charged with a legacy to *B.*; *A.* sells the estate, without having discharged the legacy. On a bill filed by *B.* against *A.* for payment of the legacy, decree against the purchasers, with decree over against *A.* in case, upon inquiry, it should turn out that no deduction had been made from the purchase money in respect of the legacy.

A TESTATOR, having surrendered his copyhold lands to the use of his will, devised the same to his brother, *Richard Kent*, for life, with remainder to his brother *Thomas Kent*, (the Defendant) his heirs and assigns for ever, subject nevertheless and charged and chargeable with the payment of £150 to each of his sisters, *Sarah* and *Elizabeth*, within six months after he should come into possession. The testator died, and *Richard Kent* came into possession under the will, and died in 1801. *Thomas Kent* then entered, and paid the £150 to *Sarah*, but not to *Elizabeth*. He afterwards sold the premises to four other Defendants, one of whom mortgaged to the Defendant *Wood*.

The bill was filed by the Plaintiffs *Newman* and *Elizabeth* his wife, to obtain payment of the legacy with interest and costs out of the estate by sale or mortgage.

The Defendant *Kent*, by his answer, admitted the statement of the bill, and that the legacy was still due, but alleged that he had no claim on the estate, and was an unnecessary party, and claimed the same benefit as if he had demurred to the bill.

The other Defendants admitted the purchase and subsequent mortgage, but denied notice, and complained of the Plaintiff's laches.

(*a*) *Ex Relatione.*

1816.

NEWMAN v. KENT.

*Hart* and *White*, for the Plaintiff, stated the doctrine to be well established, that, where a purchaser can only make a title by means of a document, the reading of which would give information of the claims of others, he shall be held to have received notice, though in fact he had never seen the document; and, alluding to various prior and subsequent cases (*a*), cited *The Drapers' Company* v. *Yardley* (*b*) as directly in point, both as to the constructive notice and supposed *laches*; then, adverting to the answer of the Defendant *Kent* objecting to the bill by way of demurrer, and to his Counsel's claim of costs, which had been made at the opening of the case, it was observed that *Kent* did not seem so unnecessary a party as he would represent himself, inasmuch as he had been a trustee for the Plaintiff; and that, if he were an unnecessary party, yet his conduct had been so unjust, in not paying the legacy to the Plaintiff, but selling the estate and receiving the whole of the purchase money without paying what he knew to be due, which conduct, moreover, had occasioned the present suit and vexation to all parties, that he could not be entitled to any costs; and the case of *Wigg* v. *Wigg* (*c*) was cited, where a person devised an estate to his second son, charged with legacies; the second son dying in the testator's lifetime, the eldest son entered and sold the estate: he was made a party to the suit as well as the purchasers, though he had no longer any claim on the property.

*Leach* and *Roupell*, for the purchasers and mort-

(*a*) *Borey* v. *Smith*, 1 Vern. 144. *Durch* v. *Kent*, 1 Vern. 319. *Taylor* v. *Stibbert*, 2 Ves. 437. *Hiern* v. *Mill*, 13 Ves. 114. *Hall* v. *Smith*, 14 Ves. 426. *Daniels* v. *Davison*, 16 Ves. 249. 17 Ves. 485.

(*b*) 2 Vern. 662.

(*c*) 1 Atk. 381.

1816.
NEWMAN
v.
KENT.

gagees, stated that, though the Plaintiff must have the legacy as prayed, yet the purchasers would have a claim over against the other Defendant *Thomas Kent*, who was a necessary party, in the same manner as if there was an original bill by them against him; and that it should be referred to the Master to investigate the transaction as between them; but that, if he was thought not to be a necessary party, and that the Plaintiff ought to pay his costs, the Plaintiff could not claim to have those costs repaid him out of the estate.

*Horne*, for the Defendant *Thomas Kent*, contended that no decree could be made against him; that it was not a personal demand, but only a charge on the estate which he had parted with and had no claim thereon. The Plaintiff had filed no replication to his answer, and he had never been called upon to state the case between him and the Defendants. That, although he had sold and received the money, the legacy was only a charge on the estate, and the Defendant had given notice to the purchaser's Attorney before the purchase was completed.

*Hart*, in reply, contended that *Kent* was a necessary party; that the bill stated that he had sold or contracted to sell; and, till his answer came in, it was not known what interest he had in the property.

*The* MASTER *of the* ROLLS

Held that there was no question in equity; but that if *Kent* had sold and obtained the money as if no legacy had been charged, and had put the money so raised into his own pocket, he ought ultimately to pay. If there had been any doubt whether or not he had received the whole money, there might be an inquiry

as to that fact; but it would be the grossest injustice to let him go away with the whole. If he had given notice, and the legacy had been deducted out of the purchase money, the vendees only would be liable, and that should be the subject of an inquiry before the Master.

"Decree, legacy, interest, and costs for the Plaintiffs as against the purchasers, &c. out of the estate, and decree over for the purchasers against *Thomas Kent*, if the result of the inquiry should be against him as to whether he had received from the purchasers the whole of the purchase money, or had made any deduction for the legacy."

## MOOTHAM v. WASKETT.

*Feb.* 20, 22.

Attachment returnable within eight days after the purification. The eight days mean eight entire days.

UPON motion that the writ of attachment issued at the instance of the Plaintiff may be discharged for irregularity, the question was whether, the attachment being made returnable within eight days after the feast of Purification, the eight days are to be taken as inclusive or exclusive.

Sir *A. Piggott*, in support of the motion.

*Raithby*, contrà.

*The* LORD CHANCELLOR,

(After consulting with the register) said that, whatever may be the practice in the Courts of Law, the at-

1816.
NEWMAN
v.
KENT.

tachment issued was regular according to the practice in Chancery, which takes the eight days to mean eight entire days.

ROLLS.
*Feb.* 6, 8, 13, 26.

## WILKINS v. FRY.

One, of two or more assignees of a bankrupt, may sue in equity, without the others joining in the suit.

To a suit instituted by assignees on behalf of a bankrupt, in the object of which the creditors have no interest, the assent of the creditors is not necessary under the stat. 5 *Geo.* 2. c. 30. s. 38.

*A.*, lessee of iron-works, &c. subject to payment of rent and performance of covenants, assigns to *B.* as a security for sums advanced and to be advanced, reserving to himself a mere equity of redemption. *A.* becomes bankrupt, and his assignees agree to convey to *B.* the equity of redemption in the demised premises. The assignees have no right to enforce against *B.* a specific performance of this agreement by accepting an assignment with a covenant for indemnity against payment of the rent and performance of the covenants reserved by the original lease.

BACON, lessee, under several indentures, of iron and coal mines in the counties of *Glamorgan* and *Brecon*, with certain rights, powers and privileges, thereto annexed; and also of messuages and premises occupied together with, and in working the same, subject to the payment of rents and performance of covenants; by indenture of lease, bearing date *March* the 1st, 1803, made between the said *Bacon* of the one part, and *Bowzer*, *Overton*, and *Lionel Oliver*, together with *Sir Jeremiah Homfray*, *Simon Oliver*, and *Ridout*, of the other part, granted to them the said parties of the second part, all the said premises, subject to the rents, covenants, and conditions, contained in the said several former inden-

tures; as to part of the premises, for a term of fifty-five years, if he, *Bacon*, should so long live; and, as to other parts, for and during the residue of his respective terms therein; at a rent of £1500 for the first twenty years, and of £1000 for the remainder of the terms. And in the said indenture were contained covenants for payment of the rents, and performance of the covenants reserved and contained in and by the said former indentures; and to indemnify *Bacon*, his heirs, executors, &c. and the several lessees in the said former indentures, in respect thereof.

The several parties to the second part of this indenture, having executed a bond to *Bacon* in the sum of £20,000 conditioned for payment of the rent and performance of covenants, took possession of the demised premises; and subsequently, from time to time, procured leases of some adjoining premises, the possession of which was advantageous to them in working the mines, which they continued to work in partnership, together till *February* 1805, when *Homfray*, *Simon Oliver* and *Ridout* withdrew from the partnership; and, by an indenture of that date, assigned their respective interests therein, viz. *Homfray's* to *Bowzer*, and *Oliver's* and *Ridout's* to *Lionel Oliver*; *Bowzer* and *L. Oliver*, at the same time, entering into a bond to *Homfray*, *S. Oliver*, and *Ridout*, conditioned for payment of all rents, and performance of all covenants to which they were jointly liable by the former bond.

After this, the three continuing partners remained jointly interested in the premises and in the prosecution of the concern, until the month of *March* 1808, when, having become considerably indebted to *Richard Bowzer*, it was proposed and agreed, for the purpose of securing to him the said *Richard Bowzer* the debt

1816.
WILKINS
v.
FRY.

then due, and which might thereafter become due to him from *Bowzer* and *Co.*, that the said leasehold premises, and machinery, &c. thereto belonging, should be assigned to the Defendants, *Frys* and *Irving*, as trustees for him, which was accordingly done by indenture, dated the 25th of *March*, 1808.

Sometime afterwards, *Bowzer* and *Co.* having occasion for further advances, they, and also *Richard Bowzer*, proposed to the Defendants, *Frys* and *Irving*, that the said Defendants should lend money and advance bills for their accommodation, and that *Richard Bowzer* should relinquish his right of priority in the premises, and the said Defendants stand possessed thereof, for securing, in the first place, the repayment of such advances.

The Defendants, having acceded to this proposal, made considerable advances accordingly on the faith thereof; and by indenture dated the 30th of *December* 1809, indorsed on that of the 25th of *March* 1808, made between the said *Richard Bowzer* of the first part, *Bowzer* and *Co.* of the second part, and the Defendants of the third part, it was declared and agreed that it should be lawful to the Defendants, their executors, &c. to pay and apply the monies to be received by them in pursuance of the trusts of the former indenture, in the first place, in paying, retaining, and satisfying to themselves all sums thereafter to become due to them from *Bowzer* and *Co.* and (subject thereto,) to be possessed of the premises for better securing to *Richard Bowzer* the sums intended to be secured to him by that former indenture.

In the meanwhile, subsequently to the assignment of *February* 1805, *Bowzer* and *Co.* took leases of adjoining premises, which they held together with those

where the business had previously been carried on, and, becoming further indebted to the Defendants, *Frys* and *Irving*, by reason of advances afterwards made, by indenture dated the 15th of *February* 1811, executed to the said defendants an assignment of all the last-mentioned premises, by way of additional security, upon the trusts of the former indenture.

In the month of *July* 1812, *Bowzer* and *Co.* stopped payment, and the Defendants *Frys* and *Irving*, "in order to prevent the stopping of the works, and to enable them to sell the same to better advantage," entered into possession, and continued to carry on the same.

On the 14th of *September* 1812, a commission of Bankrupt issued against *Bowzer* and *Co.*; and the Plaintiff *Wilkins*, and the Defendants *Tappenden* and *Gwynn*, were chosen Assignees.

After the Bankruptcy, *Frys* and *Irving* being then creditors to the amount of £60,000, entered into a treaty with the Assignees for the purchase of the entire interest of the Bankrupts in the premises; and, by an agreement reduced to writing, and dated the 12th of *November* 1812, (which was afterwards confirmed by a resolution of the creditors,) the Assignees agreed to sell to *Frys* and *Irving* all their right, title, interest, and equity of redemption, in and to the said premises, and all moveable and fixed property, and stock in trade, of the Bankrupts, and all outstanding debts owing to them at the time of their bankruptcy, (except separate property,) for £8000 over and above the dividends to which they would be entitled as thereinafter mentioned. The Assignees further agreed to execute such deeds as should be required by the purchasers for carrying the

1816.

WILKINS
*v.*
FRY.

sale into effect, and to consent to an order of the Chancellor, upon petition, to confirm such purchase, if required. *Frys* and *Irving* agreed to purchase as aforesaid, and to pay the purchase-money by £4000 on the 11th of *May*, and the remaining £4000 on the 11th of *November* 1813; also, to relinquish their claim to all dividends upon the debts then due to their firm, and on those which they might be entitled to prove, as well as all right to prove any debts due to their firm, and to accept the said property and effects in full satisfaction of all claims upon the estate of the Bankrupts, and to assign or abandon all dividends upon such debts to the Assignees, if required. It was further agreed, that *Frys* and *Irving* should be at liberty to use the names of the Assignees in any action or suit respecting the purchased property, they indemnifying the Assignees against the costs and consequences of all such suits and actions.

This Agreement was afterwards confirmed by a resolution of creditors, and also by an order in the bankruptcy, obtained at the instance of the Defendants *Frys* and *Irving*. No assignment was ever executed in pursuance of it; and the Bill, filed by one of the Assignees under the commsision against the Defendants *Frys* and *Irving*, and his (the Plaintiff's) Co-assignees, charging that, at the time of entering into the agreement, the first named Defendants had notice that there were large rents reserved, and very material covenants to be observed, on the part of the lessees and other persons holding the premises, and that they had taken from the purchasers of parts of the premises, (which they had sold since entering into the above agreement), covenants of indemnity against those rents and covenants, prayed a specific performance of the agreement, together with a declaration "that the Defendants are

under the said agreement bound, and ought to accept an assignment of the premises, to contain all usual and proper provisions on behalf of the several parties interested, *and particularly such covenants on the part of the said Defendants as with reference to the interests of the Plaintiff and his co-assignees, and of the Bankrupts, might be reasonably required for their indemnity*;" that it might be referred to the Master to settle a proper assignment, "with such provisions and covenants;" and that the Defendants *Frys* and *Irving* might execute the same; and the Defendants, the Assignees, be directed to concur in and execute such assignment; and do all other acts necessary to be done for performance of the said agreement.

To this the Defendants *Frys* and *Irving* answered, that they continued in possession of the premises till the month of *October* 1813; but had not, at the time of putting in their answer, any right, title, or interest in the same; and that, by indenture of the 16th of the said month of *October*, they assigned the same to one *Moggridge*. They admitted that the Assignees had performed their part of the agreement; that there were in the several leases and assignments in the bill mentioned such covenants respecting the premises as in the bill mentioned; that they had in their possession all the said leases and assignments at the time of entering into the agreement; and that they had taken from the purchaser such covenants of indemnity as the bill charged them to have taken: but they denied that, at the time of entering into the agreement, any stipulations respecting the covenants were made or expressed, and submitted that they were not bound to accept any further assignment than had been already made to them of the premises, or to enter into any such covenants as in the bill suggested.

1816.
WILKINS v. FRY.

The Defendants, the co-assignees of the plaintiff, by their answer admitted the agreement and subsequent confirmation, and that *Frys* and *Irving* continued in possession till the month of October, 1813, when, as the Defendants believed, the premises were abandoned and had never since been used or occupied by any person or persons to their knowledge or belief. They alleged, that they declined to concur with the plaintiff in the suit commenced by him, thinking it unnecessary, inasmuch as the other defendants had fully performed their agreement; submitting by way of plea, that, by the statute, 5 Geo. 2. entitled "An Act to prevent committing of frauds by Bankrupts," it was provided that no suit in equity should be commenced by any assignees or assignee, without the consent of the major part of the creditors, and that it did not appear the plaintiff had such consent as required by the statute (*a*).

No evidence was entered into on either side; but it was agreed to admit at the hearing, in addition to the facts already detailed, a correspondence which took place in the months of January, and February, 1814, between the solicitors of Messrs. *Frys* and *Irving* and the solicitors of Mr. *Bacon*, relative to the settlement of a special case in an action at law respecting the same iron-works, by which it appeared that, in answer to an application from *Bacon* for payment of the rent, which became due at Christmas, the defendants, by their said solicitors, informed him that "*Moggridge, to whom they had assigned the premises*, would give directions for payment thereof;" and that, to another application, and a refusal to accept of *Moggridge* as tenant in the place of the defendants, they answered positively "that they would not pay the rent demanded."

(*a*) 5 G. 2. c. 30. s. 38.

*Bacon's* solicitors then asked, "Can any assignment being executed vary the rights of parties to a suit previously instituted?" to which the solicitors of the defendants replied, "it was quite clear that, pending a suit, a party might assign his interest, subject to all the equities to which it is liable." A letter, dated the 16th of February, from *Bacon's* solicitors, followed, stating that they had been expecting the promised call from *Moggridge* with the rent; and, as they had not seen him, they would be obliged to their correspondents to favour them with his addition and description; the answer to which was, that the last account they had heard of *Moggridge* was, that he was about to sail for *America*, since which they could gain no further information respecting him.

On the opening of this case, the matter submitted by way of plea by the co-assignees of the Plaintiff was stated by their counsel as a preliminary objection, adding that, under the section of the act referred to, one of two or more assignees could not sue, even *with* the consent thereby required to be given, and that such consent must be a consent specially given at a meeting called pursuant to notice, and not merely a general authority to sue at the discretion of the assignees themselves (*a*).

To this it was answered that, in order to support the objection, it is incumbent on the party objecting to shew that there has not been the consent required by the statute; that the only meaning of the statute is, that assignees shall not involve the creditors of the bankrupt in the expense of a suit without their consent; not that they are absolutely precluded from suing, if they chuse to do it at their own risk; and that, at all events, there can be no objection to the

(*a*) *Exp. Whitchurch*, 1 Atk. 91.

1816.

WILKINS v. FRY.

hearing of a cause, *in limine*,* except for want of parties.

The *Master of the Rolls* decided, that he could not dispose of this objection before the cause was heard.

Sir *S. Romilly*, *Bell*, *Preston*, and *Wilbraham*, for the plaintiff.

The single question is, whether the plaintiff, as assignee of the bankrupt, is entitled to an indemnity in the shape of the covenants which this bill seeks to have inserted in the assignment to be executed pursuant to the agreement which, in all other respects, has been substantially performed. The assignees are bound to require this for the benefit of the bankrupt's estate; and those who refuse to concur in the suit so instituted render themselves thereby liable to the charge of collusion with the lessees refusing to take an assignment with these covenants. There is no instance of a bill filed by assignees in which it has been thought necessary to state that it is filed with the consent of the creditors. This shews that it is not incumbent on us to prove the consent, but on the party objecting to prove the negative; and then, if the suit had been for the benefit of the creditors, it might be for the Court to notice the defect. But even then the Court would not refuse relief where the suit, as is the case with the present, is not for the benefit of the creditors, nor at their expense. The only persons liable for breach of these covenants are the bankrupt himself and his assignees. It is, therefore, for their security alone that the suit is instituted, and they only are liable to sustain the charges. The liability of the assignees has accrued from their having accepted the lease; but, had they not done so, they would no less

have been bound to institute this suit for the indemnity of the bankrupt.

The case of *Staines* v. *Morris* (a) has sufficiently established that the right of a lessee to require from his assignee an indemnity against the effect of the covenants contained in his lease extends to an assignment by the assignee of the original lessee. That was indeed a strong case, because the Plaintiffs, being executors, could not be called on to covenant for the title of their testator. If, in the present case, *Homfray* and *Co*, (the original lessees) had assigned to the Plaintiff, and the Plaintiff to *Fry*, it is clear that *Fry* must have given a covenant of indemnity. But here, *Fry* took an assignment, in the first instance, by way of mortgage; the mortgagors afterwards became bankrupt, and the present agreement is for a release only of the equity of redemption. If, then, a man enters into an agreement to purchase the equity of redemption of a leasehold estate, will he be obliged to give such covenant of indemnity to the assignees of that equity of redemption? Undoubtedly, as mortgagee, he might have advanced his money upon what security, and under what terms, he pleased; but, so soon as, from a mortgagee, he contracts to become the absolute owner, he is bound by every equity to which other purchasers are liable. But then it may be contended, that the assignees are not liable in this instance to the covenants of the original lease, never having had the legal estate in themselves, and that the bankrupt is not liable, being protected by the statute (b).

(a) 1 Ves. & B. 8.

(b) 49 *Geo.* 3. c. 121. s. 19. which enacts that where bankrupts are entitled to leases, and their assignees accept the same as part of their estate, the bankrupts shall not remain liable to the rent reserved, or covenants contained in the lease.

1816.

WILKINS
v.
FRY.

But, not to say that the provision of the Act does not apply to the case in question, because the legal interest was not in the bankrupts, but in the mortgagees, at the time of the bankruptcy, they were liable on bond, as well as on the covenants in the lease; and it cannot be contended that the statute operates to discharge them from that liability: and, even if they were so discharged, those of the original lessees who afterwards assigned their interest to the bankrupts remain liable, and the bankrupts are liable over to them by virtue of the bond executed to them on their withdrawing from the partnership. But further, it is impossible to contend that the bankrupts are discharged by the statute without admitting that the assignees become liable by their acceptance of the lease, unless it be affirmed that the lessor is left altogether without any remedy.

The question, then, which remains is, whether the *Frys* have got rid of their liability in equity by the alleged assignment to *Moggridge*; an assignment, for which no consideration is pretended to have been given, and which appears to have been made merely for the purpose of eluding their obligations to the bankrupts and their assignees. This is a case which resembles that of *Philpot* v. *Hoare* (a), and falls expressly within the distinction taken by Lord *Hardwicke*, in *Valliant* v. *Dodemeade* (b), of a collusive assignment. Suppose a lease of coal-mines, subject to a royalty rent; the lessee becomes bankrupt; his assignees accept the lease, exhaust the mines, and then assign away the remainder of the term: there could be no doubt, in a case of that sort, that a court of equity would not consider them as having discharged themselves from their liability.—

(a) 2 Atk. 219. Amb. 488. (b) 2 Atk. 546.

1816.

WILKINS v. FRY.

In *Lucas* v. *Comerford* (a), which was a lease with a covenant to rebuild, the Plaintiffs, who were executors of the lessor, filed their bill against the equitable mortgagee of the lease for specific performance of the covenant; the defence set up was, that the Defendant had not the legal estate, and Lord *Thurlow* decreed that he should take an assignment, for the purpose of giving the Plaintiffs a remedy against him.

There can be no objection from the circumstance that this is the bill of one assignee only, not of the three. One executor may sue, stating that his co-executors have refused to concur.

*Hart*, *Cullen*, *Wetherell*, and *Heys*, for the Defendants.

This bill is decidedly objectionable in point of form. The estate of a bankrupt is, by the assignment, vested in all his assignees as in one person, and, as such, they must all sue together, it being incompetent for one to sue, alleging that the others have refused to join in the suit. It is not the case of trustees suing for the benefit of their *cestuys que trust*. They are constituted by the act of the parties, but the assignees of a bankrupt by the operation of law. The only remedy for an assignee, in case of his co-assignees refusing, is to apply by petition to the Lord *Chancellor*, who, upon a proper case being made, will direct the others to join in the suit at his own discretion. The other objection, that these assignees, even if they had all joined, are precluded by Act of Parliament from suing without the consent of creditors, is equally conclusive. It must, indeed, be admitted that, in cases where this objection has not been raised, the Court has acted as if

(a) 3 Bro. 166. 1 Ves. J. 235.

1816.

WILKINS v. FRY.

it did not exist; in other words, that the Court will presume an assent, when it is not shewn that no assent has been given. But, in this case, the assignees, who are made Defendants, expressly negative the fact of assent, so far as their knowledge extends, and by that throw it on the other side to prove that the assent was given. Then it is said, that the construction of the Act is, not to disable assignees from suing without such consent, but only to make them responsible for the consequence of so doing; but the words of the Act render any such construction impossible.

As to the merits of the case, the only ground for supporting this bill is, that the assignment alleged by the *Frys*, in their answer, to have been made *to Moggridge* since the bankruptcy, is a mere colourable assignment to rid themselves of their responsibility. We admit it to be so, and that it was made merely with a view of protecting themselves against the effect of the covenants in the original lease. They had a right so to protect themselves. The condition in which they stand is this; they are induced to make a loan upon the security of property which they are led to believe is of very considerable value: they afterwards advance an additional sum for the assignment of the equity of redemption of this property: all this they have done without any privity with the original lessor. The property now turns out to be of no value; but, having taken it at that risk, they are obliged, and are content, to consider all the money advanced by them beyond what they have been enabled to repay themselves out of it as lost. But that which is now aimed at, is to fix them, after a loss to so large an amount, with the further injury of keeping the estate, unproductive as it is, subject to all the burthens of the original lease, operating as an additional loss, and a loss constantly accruing.

What is the contract which these Defendants are called upon to execute? They had the whole legal and beneficial interest of the lessees, subject to a right of redemption vested in themselves prior to the bankruptcy; and it is only this resulting equity which they have now agreed to purchase from the assignees, and that in terms so guarded as to leave nothing executory in the contract. They require no deed, no act whatever on the part of the assignees, to confirm their estate in the property. They have taken a release of all the interest which the assignees had, or could have; but stipulated for nothing that could impose upon them any further obligations. No corresponding act is required to be performed on their part. The assignees are bound only to execute such deeds as the purchasers may require: more than this, those deeds are to be at the expense of the purchasers. Nothing can be plainer than the terms of such a contract, which says merely that, if any further deed is required, it shall be at the expense of the purchasers; and they require none.

The case of *Staines* v. *Morris* does not apply; for that was the assignment of a beneficial interest which the assignee, if he took at all, was bound to take, subject to the burthens which were imposed upon and went along with it. The executor also had the legal estate, and the contract was, to take the whole interest which the executor had. In this case, the Defendants contracted for a benefit; and shall they, through a mistake as to the nature of that for which they contracted, after losing the price of the purchases, be compelled also to take a burthen as incident to it?

The legal estate only can be made answerable at law for the performance of covenants; and, in this case, the legal estate was not in the assignees of the bank-

1816.

WILKINS v. FRY.

rupts. In *The Mayor of Carlisle* v. *Blamire* (a), the question was, Whether an action on the covenant were well brought against the Defendants, (who were only devisees of an equity of redemption in the estate of the Covenantor,) as assignees of all the estate, right, title, and interest of the Covenantor; and it was held that it was impossible to say that the Defendants were assignees within the sense and meaning of the terms, "which respect that description and quality of estate alone," namely, legal estate, in virtue whereof parties are not at all liable to actions of covenant, as assignees (b).

Then, how can it be said that the assignees are bound to protect the interest of the bankrupts? Supposing they were so bound, no conveyance to be executed by these Defendants could in any respect benefit them. A bankrupt cannot be sued in debt; but, till the late statute (c), he would have remained liable for ever in covenant. *Mills* v. *Auriol* (d).

To sum up the whole, it is not pretended that the Defendants are liable to be called on to give covenants of indemnity under the original deed. Neither are they liable under the agreement, because that agreement was to take a mere equity, they having already the whole beneficial interest, subject to that equity, besides a perfect legal title. The agreement can add nothing to the terms of the original deed; therefore, if not bound by the latter, they cannot be

(a) 8 East, 487.

(b) P. 496.

(c) 49 *Geo.* 3. c. 121.

(d) 1 H. Blackst. 433.—And see *Boot* v. *Wilson*, 8 East, 311. *Wadham* v. *Marlowe*, ibid. 314, note. *Millen* versus *Whittenbury*, 1 Campb. 428. *Bourdillon* v. *Dalton*, Peake, 237

bound by the conjoint operation of both. But, lastly, supposing they had been liable in equity, after entering into the agreement, their liability has ceased, in consequence of the subsequent assignment; and they had a right to assign. *Taylor* v. *Shum* (a).

*Sir S. Romilly*, in reply.

This is not a question in which the creditors have any interest, therefore not a question within the meaning of the Act, requiring their assent to a suit instituted for their benefit. With regard to the objection, that one of several assignees cannot file a bill without the rest joining, it applies equally to the case of executors, and yet it is established that one of several executors may so act; and that, in equity, he may sue on his own account, although in law he is required to proceed in the name of himself and his co-executors. It is not necessary to shew collusion in the other executors; he may proceed solely on his own responsibility; and nothing is more common than for an executor so to proceed. The objection, in the case of assignees, will hold good only to this extent; that, when there has been a meeting of creditors who authorise the assignees to institute a suit, and then one of the assignees refuses to act, alleging that he does not think it for their benefit that the suit should be instituted, his co-assignees cannot proceed without him, but must petition the Chancellor.

The case then is reduced to that which is the main question upon the merits, Whether the bankrupt himself is entitled to have the covenant for indemnity inserted in the assignment to be executed pursuant to

(a) 1 Bos. & Pul. 21.

1816.

Wilkins v. Fry.

the agreement; and, if he is entitled, whether his assignee has a right, or rather whether it is not his duty, to institute this suit for the bankrupt's benefit.

In this view of the case, the supposed hardship of it is wholly out of the question. The Defendants having taken an assignment of the whole legal interest in these mines, work them for their own benefit, and then enter into an agreement to take in the outstanding equity, so as to give themselves the absolute ownership, free from redemption. What is this more than the lease of a mine for a long term of years? If the lessee thinks fit to exhaust it in the beginning of his term, and so to anticipate the whole benefit, the only compensation he can make to the lessor, and to which the lessor is fully entitled, is to secure his interest reserved on the lease for the remainder of the term. If, then, there were any hardship in the case, it would fall on *Bacon*, the original lessor, and not on these Defendants.

There is no question but the bankrupts remained personally liable, and are still liable, notwithstanding the Act of Parliament, in respect of future breaches of covenant. Then, are they not entitled to the same protection as if they were not bankrupts? And how can they be protected otherwise than by their assignees? They cannot institute a suit for their own benefit. They need not be parties to a suit instituted by their assignees on their behalf; for the assignees represent all persons having any interest in the estate as fully and effectually as an executor. *Alsager* v. *Rowley* (a). Then, supposing the assignees to have the

(a) 6 Ves. 748. See also, on the point as to executors, *Utterson* v. *Mair*, 2 Ves. i. 95. Bro. 270, and others

power of calling for the execution of an agreement made with the bankrupts, for their benefit, are they not bound to exercise that power?

Consider this as if there had been no previous mortgage, but a mere contract to take an assignment of the estate of the bankrupts: should we not, under such circumstances, be entitled to compel the purchaser to give us a covenant for indemnity? Certainly; for this would then be precisely the case of *Staines* v. *Morris*. Then, how is that case distinguishable, in principle, from the present? But that of *Lucas* v. *Comerford* is still nearer, being, like this, the case of an equitable assignment, and the Defendant contending that, having no title but as mortgagee, he was not bound by the covenants in the lease which he had accepted by way of deposit. The Plaintiff in that case was the representative of the original lessor; and we, in the present case, stand in the same situation with *Stapleton*, the lessee, who was also a Defendant there. The Lord Chancellor, *Thurlow*, decided that the equitable mortgagee could not take the estate as a security without the burthen that was upon it, which, being once accepted, he could not abandon, and therefore decreed that he should take an assignment. The Defendants, in this case, are clearly bound by the same equity.

*The* MASTER *of the* ROLLS.

If the bill in this case can be supported upon the merits, I do not think it is liable to be defeated by

of that class of cases; and, with regard to assignees, *Saxton* v. *Davis*, 18 Ves. 72.

1816.
WILKINS
v.
FRY.

either of the two preliminary objections taken in the opening of the cause.

This is not a suit instituted on behalf of creditors, nor have they any concern in the result of it; for, so far as respects their interests, it is admitted that the agreement in question has been fully performed. But the bill insists that it has not been performed to the extent in which the Defendants, (the Messrs. *Frys*), are bound to perform it, in respect of the indemnity to which the bankrupt or the assignees claim to be entitled.

Now, if there be a right to such indemnity, I do not see how the dissent of some of the assignees can prevent the others from asserting that right.

All persons who have a joint interest must join in an action at law; but in equity, it is sufficient that all parties interested in the subject of the suit should be before the Court, either in the shape of Plaintiffs or of Defendants.

Neither do I see how the prohibition of the statute of the 5th *Geo.* 2. can apply to a case of this description.

In the clause immediately preceding that which is referred to (*a*), a time had been fixed, within which the assignees should make a final dividend, unless some suit at law, or in equity, should be depending, or some of the property should be outstanding. Now, as suits in equity, generally, and almost necessarily, do depend for a longer period than suits at law, and consequently

(*a*) 5 *Geo.* 2. c. 30. s. 37.

must longer delay the final dividend, it was thought proper by this clause to give the creditors a right to decide for themselves, whether any proceedings in equity should be instituted for their interest with respect to a bankrupt's property; but a suit, in which the creditors have no interest, which, neither in its result nor by its dependance, can injure or benefit them, cannot be such a suit as the legislature meant to give them a right of stopping *in limine*, by saying, we do not choose it shall be instituted.

Then as to the merits—That which is claimed by this bill is, that the Defendants, (the Messrs. *Frys*), shall be compelled to take an assignment, containing such covenants on the part of the said Defendants as, with reference to the interest of the assignees, and also of the bankrupt, may be reasonably required for their indemnity. The real question in the cause is, whether these Defendants are bound to enter into any covenants of indemnity, for the protection, either of the bankrupt or of the assignees, against the rent and covenants reserved by the original lease; for it must be admitted, that a mere formal assignment, containing no such covenants, would be an idle ceremony, and productive of no advantage to any person.

Now the doctrine with respect to the covenants which the vendor of a lease is entitled to require, independently of positive stipulation from the vendee, has been very clearly laid down by my Lord *Chancellor*, in the case of *Staines* v. *Morris* (a). When I speak of covenants that may be exacted independently of positive stipulation, I mean such as are incident to the nature of the contract, and presumably therefore

(a) 1 Ves. & B. 8.

1816.

WILKINS
v.
FRY.

in the contemplation of both the parties to that contract. When a lessee carries his lease to market, his intention must be, at one and the same time, to get quit of the burthen, as well as of the benefit, of his lease; and, although he cannot do that effectually as between himself and his lessor, to whom he must still continue bound, yet he can obtain an indemnity from the vendee of the lease, and it is reasonable that that indemnity should be given by the person who is to be immediately invested with all the beneficial interest in that lease. That doctrine the Lord *Chancellor* laid down in the case that I have mentioned. Lord *Thurlow* intimated the same opinion in the case of *Pember* v. *Mathers* (*a*), although, in the result of that case, his Lordship directed an issue to try whether there was not an express promise, on the part of the purchaser, to indemnify the seller of the lease.

In the case of *Lucas* v. *Comerford* (*b*) no question was raised or decided with respect to the covenants which the purchaser of a lease is compellable to enter into. *Comerford* was the equitable mortgagee of the lease, and he was in possession; and, if he had had the legal possession, it is clear he might have been sued at law on the covenants in the lease; and that, whether he had entered into any personal covenant or not. The landlord brought his bill for the purpose of enforcing a specific performance of the covenant to rebuild: that covenant had attached during the time that the mortgagee was in possession, and it remained unperformed. If the assignment had been a legal assignment, he could have been sued at law for the breach of that covenant by the landlord; but the landlord sued in equity, because he was only an equitable assignee, and Lord

(*a*) 1 Bro. 52.

(*b*) 3 Bro. 166. 1 Ves. J. 235.

*Thurlow* refused a decree for specific performance, on the ground that a Court of Equity does not specifically execute a legal assignment; but he decreed that *Comerford* should render his equitable into a legal estate, the consequence of which would be that the landlord would have a right to proceed at law against him.

Now, see how the case stands with respect to assignees in bankruptcy: they do not obtain the property of a bankrupt by any contract between them and the bankrupt; they take it by the operation of law, and enter into no covenants to indemnify the bankrupt against the covenants in his leases. They may waive his leases, and so not become liable to the landlord at all; they may take to them, subject only to such liability as attaches upon all assigns, that is, a liability to be sued on such covenants as binds assigns during the time they retain that character; but, when they cease to retain it, their liability ceases, the privity of estate which alone makes them liable to be sued being determined. The assignees, therefore, of a bankrupt, after they have parted with the possession of their lease, are not liable to be sued at all; they stand in no need of an indemnity, and there is no principle on which they can require it for the vendee of their estate.

The case of an executor is altogether different: an executor, to the extent of assets, is liable to be sued upon his testator's covenants, without regard to his having, or not having, the possession of the lease.— Even if the testator had, before his death, assigned the lease, the executor would not be the less liable to be sued upon the covenants. He cannot, by assigning it away himself, get rid of his liability to be sued. There is, therefore, a reason why he should require a covenant of indemnity, just as much as there was why

1816.
WILKINS
v.
FRY.

the testator himself should have required such a covenant; because, as the testator was bound by the personal covenant, the executor is bound to the extent of assets by the same covenant.

In the case of *Staines* v. *Morris* (a), the Lord *Chancellor* held that *Sir William Staines* was bound by an express personal covenant, though he had not executed the instrument in which it was contained. He took the estate under that instrument, and therefore took it subject to the accompanying covenant. His executor, therefore, had a right to require that, when he carried the lease to market, the purchaser of that lease should enter into a covenant to indemnify him from any future suit to which he would otherwise remain liable. An assignee has no such ground for requiring such a covenant.

But, supposing that, with regard to assignees in general, it were a matter of doubt whether they, having once taken to the bankrupt's lease, could get rid of the liability to be sued by afterwards parting with that lease; yet these assignees never were at any moment liable to be sued upon any one of the covenants in the lease, because it never could be alleged, as against them, that all the estate, right and interest of the bankrupt in the premises, came to and was vested in them, which it is necessary to declare, in order to maintain an action against an assign upon a covenant. They take nothing from the bankrupt but a mere equity of redemption; for he himself had, before his bankruptcy, assigned away the whole legal estate. Indemnity to them, therefore, would be without a meaning, for no question could ever arise whether they had or

(a) 1 Ves. & B. 8.

had not ceased to be liable, inasmuch as their liability never had any existence.

If, then, the assignees themselves do not need, and cannot require, a covenant for their own protection, can they insist upon such a covenant for the protection of the bankrupt? I must here again repeat what I before said, that the assignees do not take from the bankrupt his property by virtue of any contract, but by the operation of a positive law. The rights and obligations implied in a transaction between two parties dealing upon an equal footing with each other, cannot come in question in such a case as this. The bankrupt has no right to prescribe any terms upon which he will part with his property. It is wrested from him for the benefit of his creditors, and is to be applied to the best advantage, for the purpose of paying their debts. The assignees take a beneficial interest in the lease, while the bankrupt himself continues burthened with all the covenants. This is clearly the case so long as the assignees themselves continue in possession of the lease, because they may use the lease to the best advantage; and the bankrupt, in the mean time, has no covenant of indemnity whatsoever. Now, can his situation be altered, or can a new right accrue to him merely because the assignees, instead of themselves enjoying the benefit of the lease, choose to carry that lease to market, and to make profit of it in the shape of sale, instead of in the shape of enjoyment? What right accrues to the bankrupt from that use which they make of his property? What is it that they offer to sell? The same beneficial lease which they themselves have. They have a beneficial lease to sell; and can they say to the purchaser, it is not that beneficial lease which you have bought, but you have

1816.
WILKINS v. FRY.

bought a less beneficial lease than that which we had to sell; you have bought from us a lease clogged with covenants and conditions which considerably reduce the value of that lease? For, undoubtedly, a lease, with respect to which a man is obliged to enter into covenants which will at all times bind himself, whether the lease remains of value, or becomes of no value, will fetch less than a lease clogged with any such covenants. Unless there be an actual stipulation for the purpose, how can a purchaser understand that he is buying any thing except the estate as it stands vested in the assignee? How can he understand he is to take it in any other plight? But I very much doubt whether assignees, who are mere trustees for creditors, would be justified in annexing any such stipulation to the sale of a lease; for, as I have already said, it would reduce the value of the lease; and can assignees, for the benefit of the bankrupt, diminish the value of that property of which they have all the management for the benefit of the creditors? I apprehend that they could not.

In none of the cases in which bankrupts have been sued upon such covenants, and in which the hardship of their liability to be sued upon such covenants has been strongly pressed, was it ever suggested that there was any mode in which they could be protected against that hardship, except by legislative interposition. To a certain extent that relief has been applied by a recent Act of Parliament (a); but it is admitted that that Act does not operate in the present instance. I am, upon the whole, of opinion that the bill must be dismissed, inasmuch as there is no

(a) 49 Geo. 3. c. 121.

ground for the claim it sets up; and that it must be dismissed with costs against the co-assignees of the Plaintiff: but, as the question is new, the Plaintiff must not pay the costs of the other Defendants.

---

*Ex parte* GLOVER, in the Matter of GLOVER.

*Feb.* 27.

No costs to a party suing out a Commission of Lunacy, which was never acted upon and afterwards superseded; because, the property never having come into the possession of the crown, there is no fund out of which costs can be given.

A PETITION was presented on the part of a person against whom a Commission of Lunacy had issued; complaining of improper conduct in the witnesses examined on the inquisition, alleging the subsequent recovery of the Petitioner, and therefore praying that the commission, under which no further proceedings had been had, might be superseded.

Sir S. *Romilly*, in support of the Petition; which was not opposed.

*Treslove*, for the Solicitor under the Commission, applied for costs, alleging that there were no imputations in the Petition against his Client, who had been employed by the Petitioner's Wife, at whose instance the Commission had issued; and producing a letter written by the Petitioner to the Solicitor's agent in town, subsequent to the time of his alleged recovery, wherein he expressed his opinion that it was better the Commission should proceed, and his Wife be appointed sole Committee, being persuaded that many of the persons who owed him money would much sooner pay it to her than to himself. This suggestion was after-

1816.

*Ex parte* GLOVER, in the Matter of GLOVER.

wards abandoned; and it appeared that, in consequence of the amendment in the Petitioner's health, no proceedings whatever had taken place under the Commission, either before or since the date of the letter.

*The* LORD CHANCELLOR,

I can make no order on the subject of costs. If the solicitor had proceeded for the benefit of the individual, and a committee of the person and estate had been regularly appointed, I might have done something; but now there is no fund on which any order can be made to attach, and the solicitor must look, in this instance, for his indemnity to the person by whom he was employed. The Commission must be superseded; but I have no concern with the costs whatever (*a*).

(*a*) See Ex Parte *Ferne*, *Sanderson*, Coop. 108. 5 Ves. 832. *Sherwood* v.

1816.

Brouncker v. Bagot.

The first case in which it was decided that where an estate is given for life, with remainder to the heirs of the body of the tenant for life, notwithstanding the interposition of an estate to trustees to preserve contingent remainders, the remainder to the heirs of the body so unites with the estate for life as to vest an estate tail in the first taker, is that of *Coulson* v. *Coulson* (a); a decision, at the time, and long afterwards, considered so repugnant to the manifest intention of the testator, that, in order to avoid it, Lord *Hardwicke*, in *Bagshaw* v. *Spencer* (b), took the distinction between a *trust* in equity and a mere *legal estate*, which has since been held to render that last-mentioned case anomalous in point of doctrine (c).

It must therefore, no longer be disputed that the words here used will give an estate tail, even where it is certain that the testator's intention was to give only an estate for life. But this was a construction against which the Courts long struggled; and it was considered and reconsidered by the first authorities in the law, so as to evince the strongest anxiety to get out of its influence. But to the present case the same rule does not apply. In sacrificing, (as in the case of *Coulson* v. *Coulson*), the particular object of the testator, so far as to say that the person to whom he meant to give an estate for life shall take an estate tail, you have the merit of making a particular private intention yield to that which the law says is the general intention. But, where the property given is leasehold, instead of being

(a) 2 Stra. 1125. 2 Atk. 246. See Fearne's Cont. Rem. 249.

(b) 1 Ves. 142. 2 Atk. 246, 570, 577. Fearne, 178.

(c) *Hodgson* v. *Ambrose*, Doug. 330. Fearne, 272. *Doe* v. *Laming*, 2 Burr. 1109. Fearne, 235.

1816.

BROUNCKER v. BAGOT.

freehold, all inference of intention must be defeated by a construction which, rendering the interest absolute in the first taker, cuts off entirely every succeeding limitation. Is this, then, a case in which the Court will strain itself, by bare analogy to an arbitrary rule of construction, to render null the manifest intention of a testator?

*Ward* v. *Bradley* (a), *Jacobs* v. *Amyatt* (b), *Hodgson* v. *Bussey* (c), *Lyde* v. *Lyde* (d), are all cases in which words that would have been construed words of limitation in a devise of real estate, were held to operate as words of purchase in passing a chattel interest. I cite these cases only for the purpose of shewing the extreme anxiety of the Courts to get out of the rule wherever it is possible to do so.

*Knight* v. *Ellis* (e), Ex Parte *Sterne* (f), *Keily* v. *Fowler* (g). If words are to be found in any subsequent part of a will to repel the presumption of law arising out of that which precedes it, they will be carefully taken hold of and examined. The case of *Forth* v. *Chapman* (h) was much more difficult to deal with than the present; yet there, in order to give effect to the limitation over of the chattel interest, it was decided that the same expression of "leaving no issue," should be construed, as to the freehold, a dying without issue generally, and, as to the leasehold, restrained to dying without issue living at the death of the testator.

(a) 2 Vern. 23.
(b) 4 Bro. 542. 13 Ves. 479. n.
(c) 2 Atk. 89.
(d) 1 T. R. 593.
(e) 2 Bro. 570.
(f) 6 Ves. 156.
(g) Vide Fearne's Ex. Dev. 236.
(h) 1 P. W. 663.

If, in the present case, the codicil had expressly given this leasehold estate to *George Tito Brice* for life, with remainder to trustees to preserve, &c. with remainder to the heirs of the body of *Brice*, upon the authority of all the cases, this would not have passed the absolute interest to the first taker. Then why is it to be construed as doing so by way of relation?

*Preston*, for the Master's report.

There is no reasonable ground for doubt that it was the testator's intention to give by this codicil agreeably to the rules of law. In order to raise the contrary inference, it is necessary, in the first place, to assume that the testator did not mean to give an estate tail by the words he has used in devising his real estates. But this is a point not to be conceded; for, as it has been clearly decided by a long succession of cases that those words are calculated to pass that degree of interest in real property, the presumption in every case that now arises must be that the testator was not ignorant of the law, but intended, in fact, that which the law says he shall be taken to have intended. Then, if he has given an estate tail in his real property, what does he mean by saying that he gives his leasehold "for such estate and in such manner" as he had already given his freehold, but to give an estate tail in his leasehold also? But that is an intention which the policy of the law, aiming against perpetuities, prevents from taking effect, by saying that when a chattel interest is limited to one in tail, that is an absolute and complete disposition of the whole to himself and his executors. There is no more in the case than this. Then what should prevent the rule of law from operating? But, granting that the intention of the testator were necessarily

1816.
BROUNCKER
v.
BAGOT.

such as it is represented to be, how would it be better effected by giving force to the construction contended for? By that construction, *George Tito Brice* would take this leasehold estate for life; but the remainder in tail would, by the rule of law, vest the absolute interest in his eldest son. Thus the father would be defeated of the power of disposing of the property, only to vest that power in the son, to whom there is no more reason for imagining that the testator meant to give the power than to the father.

Nothing can be more different than the present case from that of *Forth* v. *Chapman*(a), where the reason of giving the same words a different construction, in the case of the freehold and that of the leasehold estates devised, was, because otherwise the limitations over, as to the leasehold, would have been entirely defeated. All the other cases that have been cited involve a similar distinction: but, in *Daw* v. *Pitt* (b), where the point was expressly raised as to a limitation over in default of issue, after an estate to *A.* for life, with remainder to the heirs of his body, of personal property, the Lords Commissioners having decided on a rehearing, contrary to the judgment of the Master of the Rolls, in favour of the limitation over, that decree was reversed on Appeal to the House of Lords, and the doctrine thereby clearly established that the estate is absolute in the first taker.

With regard to the established legal construction of the words here used, the cases are, indeed, more numerous and strong than we can possibly require. *Doe* v. *Eastrop* (c), *Austen* v. *Taylor* (d).

(a) 1 P. W. 663.

(b) 6 Bro. P.C. 450. *Earl of Chatham* v. *Tothill*.

(c) 2 Blackst. 1228.

(d) Amb. 376.

*Sugden*, in reply.

The cases last cited have no bearing on the present. That in *Blackstone* has clear and express words, such as, I have already conceded, would effect the purpose which is there decided to have been effected, but which are wanting here. In *Austen* v. *Taylor*, there was a trust of the personal estate, to be laid out in land, (of course lands of inheritance), and settled to the same uses as the real. In that case the testator was his own conveyancer; and there existed no possible ground for imagining that he entertained a different intention from that which the law affixed to the words he had used. I expected to have been referred to the cases of personal estate devised to go as heir-looms; but not one could have been pointed out, in which a person has been held to take the absolute interest in the chattel, where a clear estate tail was not given to him in the real estate. It is said that the clauses in this will and codicil cannot be read separately; but the case of *Forth* v. *Chapman* is a direct authority that they *may* be read separately. The question is, Whether the Court will not give effect to the intention by directing the two estates to go together, so far as they can go together, consistently with the rule of law. If the testator had meant as they suppose him to have meant, he had a very short way of expressing his intention, which was, not by saying that this leasehold estate should go in the same manner as his real, but by simply giving that leasehold estate to *George Tito Brice*, and his executors.

At all events, this is a will of so doubtful construction, that the Court will not require a purchaser to accept a title depending upon it.

March 4. 1816.

Brouncker v. Bagot.

*The* Master *of the* Rolls.

The question arises on a devise of a leasehold by codicil, "for such estate and estates, and in such manner and form," as the testator had by his will devised his real estate. The devise in the will is to *A.* for life, without impeachment of waste, with remainder during the life of *A.* to trustees, to preserve contingent remainders, with remainder, after the death of *A.* to the heirs of his body, with remainders over for default of such issue; and a power of jointuring is given to *A.* when in possession. Now, it is admitted that this devise gives an estate tail to *A.* in the real estate; and it therefore seems to follow that the devise to *A.* of the leasehold "for the same estate," &c. would give him the absolute interest in the leasehold: according to the rule of law, that what makes an estate tail in real property constitutes an absolute devise of a chattel interest. It is not, however, disputed that this would be so if the present case were the case of a plain unequivocal limitation of an estate tail in the real property; but it is argued, that inasmuch as it was formerly much doubted whether these words would give an estate tail, and, although since the case of *Coulson* v *Coulson* this has been considered as a settled point of construction, yet as it is contrary to the apparent intention of the testator, the Court will not do further violence to that intention by giving such effect to the words of reference by which this leasehold estate is devised as if those words constituted a substantive and direct limitation. In answer to this, it must be said, that the testator himself has no where told us what he considered to be the effect of the words he has used in devising his real estates; and, since the law has said that those words shall be construed to operate an entail, what substantial difference can there

1816.

BROUNCKER
*v.*
BAGOT.

be between his using the words themselves in the one place, and employing them again, by way of reference, in the other? The law says, that the testator has given an estate tail in his real property, and thus furnishes a criterion for explaining his meaning when he gives his personal property "for the same estate," &c. as he has already given his real. On the other hand, I do not see how it is possible to decide that an estate for life only is given in the personal estate, the testator having expressly given an estate tail in the real.

In *Foley* v. *Burnell* (*a*), *Vaughan* v. *Burslem* (*b*), and the other cases in which personal property, devised to be enjoyed as heir-looms by the persons successively entitled to the possession of real estate, has been held to vest absolutely in the tenant in tail of the real estate, would it make any difference if the estate tail had been created, not by express words, but by words which are construed to create an estate tail?

In *Richards* v. *Lady Bergavenny* (*c*), where an estate, together with the furniture of the house, was limited to Lady *Bergavenny* and such heir male of her body as should be living at her death, and, in default of such, remainder over, the words being decided to pass an estate tail in the house, it was considered by Lord *Somers* as an essential consequence that the furniture should vest absolutely in the tenant in tail of the house. Yet it was not more evident in that case, than in this, that the testator intended the real and personal property to go together.

(*a*) 1 Bro. 274.

(*b*) 3 Bro. 101. And see *Stratford* v. *Powell*. 1 Ball and B. 1.

(*c*) 2 Vern. 324.

1816.

Brouncker v. Bagot.

If there is any disappointment of the testator's intention in the case, it is rather in making his devise operate so as to give an estate tail in the real, than in giving the absolute interest in the personal estate. The present case is not materially different from that of *Daw* v. *Pitt*, which has been already cited. I have, therefore, no hesitation in saying that a good title can be made to this estate.

Exception over-ruled, but without costs.

*March* 5.

## ALLEN v. ANTHONY (a).

The possession of a tenant is notice to a purchaser of the whole actual interest he may have in the estate; therefore, of a right to the timber on the estate, although such right accrued by a title posterior to that on which his possession was grounded.

ON this day, the Lord Chancellor gave Judgment as follows:—The question which arises in this case is one of great difficulty and importance. The bill is filed for an account of timber felled by the Defendant on the estate of the Plaintiff, and for an injunction to restrain him from cutting timber, or committing any other waste or destruction on the premises. For this purpose the bill states that the Plaintiff's father was seised in fee simple of the estate in question, which he purchased from a person of the name of *Archer*, who had purchased the same of *Sarah Keir*; and that, at the time of the purchase from *Archer*, the estate was in the occupation of the Defendant, by virtue of some demise, or agreement for a demise, as tenant to *Archer*. The Plaintiff's father died on the 20th of *October*, 1814, having by will dated the 20th of *July* preceding, devised to the plain-

(a) The Reporter did not hear the arguments of the Counsel in this case.

tiff all his freehold, copyhold, and leasehold estates, in fee, or as far as the nature of his respective interests in them would extend. The bill then goes on to state, that at the death of the testator, there was a considerable quantity of timber on the estate, some of which the defendant had since cut, and threatened to cut the remainder, refusing to account for the produce; charging that there was no exception of timber in the conveyance from *Archer* to the testator, or in that from *Keir* to *Archer*; also that the testator was a purchaser without notice of any grant or conveyance to the Defendant, of the timber in question.

The Defendant, by his answer, sets up the following title:—In 1799, *Sarah Keir*, who was then entitled to the estate in fee simple, agreed to demise to one *Izard* for twenty-one years, at a certain rent, with an exception and reservation to herself and her heirs of all the timber and timber-like trees, and of liberty to cut and carry away the same. In 1808, possession was taken by the defendant under an execution on an action brought by him against *Izard*. On the 18th of *May*, 1809, *Sarah Keir* agreed to sell to the Defendant all the timber (except fruit-trees) for £200. The conveyance from *Sarah Keir* to *Archer* of the reversion in fee was posterior to this agreement. Under these circumstances, the Defendant insists, that both the Plaintiff's father, when he purchased of *Archer*, and also *Archer*, when he purchased of *Keir*, respectively knew, or must be taken to have known, and to have had notice, that the Defendant was in possession of the estate, submitting that they were respectively bound, on occasion of their respective purchases, to have enquired under what contract or agreement such possession was held. He denies that they or either of them

1816.

ALLEN v. ANTHONY.

ever made any enquiry of him respecting the nature of his possession, and says that, if they had enquired, he should have informed them of his interest in the premises, and also of his purchase of the timber.

Upon affidavit of the facts in the bill, the Plaintiff had obtained an injunction till answer, which it is now sought, on the part of the Defendant, to have dissolved.

It is so far settled as not to be disputed, that a person purchasing, where there is a tenant in possession, if he neglects to enquire into the title, must take, subject to such rights as the tenant may have. (*Douglas* v. *Whitrong*.(a) And there is no doubt that, if the Defendant had been entitled to the trees on the estate, under the agreement by which he held the estate itself, the Plaintiff would be bound by the authority of the several cases in which it has been so decided. But the question here is, whether there is any difference in the case when the right of the tenant to the timber arises by a contract made independent of, and posterior to, the contract under which he holds possession of the estate; and, on the best consideration that I am able to give to the subject, I think it would be going on a distinction much too thin to determine that he may be restrained from the exercise of that right in the latter case, although he could not have been so restrained if his title to the timber had been coincident with his title to the possession of the estate. There is no more reason in the one case than in the other, to say that the purchaser was not bound to make inquiry as to the nature

(a) Cited 16 Ves. 254. And see *Daniels* v. *Davison*, 16 Ves. 249, and cases there cited.

and extent of the tenant's interest. He must therefore suffer the consequence of his neglect to take that obvious precaution.

Injunction dissolved.

## HULME v. HEYGATE.

ROLLS. *March* 5, 6.

Testator by his will devises all his freehold and copyhold manors, &c. and real est whatever,

MAY 28th, 1811.—*Michael Heathcote*, by his Will of this date, duly executed to pass real estates, after giving to his only daughter and heir at law, the Plaintiff *Elizabeth Hulme*, a contingent interest in the sum of £60,000 stock, and otherwise disposing of personal property to a [illegible] nt, gave, devised [illegible]

1816.
HULME
v.
HEYGATE.

*Exchequer*,) to and to the use of the Defendants, *James* and *William Heygate*, their heirs and assigns, in trust for his grandson, the Defendant *Heathcote*, for life, and after his death, for the first and other sons of his body successively in tail male; and for default of such issue, for the Defendant *Unwin* for life, and after his death, for his first and other sons in tail-male, and, after several intermediate remainders, with a remainder in trust for his daughter, the Plaintiff *Elizabeth Hulme*, for life, with remainders over. The Testator also gave and bequeathed to the same trustees and another, the sum of £35,000, upon trust to lay out and invest the same in the purchase of freehold estates in feesimple in possession, in the counties of *Hertford* or *Northampton*, and either with or without copyholds intermixed, to be conveyed and assured to and to the use of the said trustees, their heirs and assigns, upon the same trusts, and under and subject to the same pr[illegible] were before expressed [illegible] he gave

and assigns, upon the trusts in my said will mentioned concerning my real estates thereby devised; and I direct that the said sums of £5308 and £3300 shall be deemed and considered as part of the sum of £35,000, by my said will directed to be laid out in the purchase of freehold lands, &c. And I hereby ratify and confirm my said will, in all respects, except as the same is hereby varied."

Between the dates of his will and codicil, the Testator entered into an agreement with one *Packer*, for the purchase of another estate besides those mentioned in the codicil to have been purchased and contracted for as above; which agreement was reduced into writing, and was as follows:—

"*June* 18*th*, 1811.—Mr. *Packer* agrees to sell his estate in *Hertfordshire*, called *Street Farm*, to *Michael Heathcote*, for £7000, £3000 to be paid in *October* next, and £4000 in *January* 1812. Mr. *Heathcote* agrees to take it on the above terms, and to pay a further sum of £100 for the timber growing thereon. To take rents from *Michaelmas* next."

Possession was taken under this agreement before the date of the codicil, shortly after which, (as it appears by the evidence), an abstract of title was delivered, which being found very imperfect, was subsequently amended, and the title at length approved by the purchaser's conveyancer, subject to some observations and enquiries relative to an outstanding term; but it was never finally approved by him; and, on the 18th of *July*, 1812, a new agreement was made and entered into between the parties to the former agreement, as follows:

1816.

HULME
v.
HEYGATE.

"*Richard Packer*, in consideration of £7100, to be paid as follows, *viz.* £3000 after signing this agreement, and £4100 by four several instalments," (the last of which was on the *31st* of *January*, 1814,) "agrees to sell to *Michael Heathcote* all, &c. called *Street Farm*, twenty acres of which is freehold, and the remainder copyhold held of the manor of *Hemel Hempstead*, at the yearly quit rent of 2*l.* 14*s.*, and that he will, upon payment of the said £4100, as before-mentioned, convey, surrender, and assure unto the said *Michael Heathcote*, his heirs, &c. as he or they shall direct, the said messuage, farm, and land. And it is hereby further agreed, that the said *Michael Heathcote* shall be forthwith let into possession, and have the rent from *Michaelmas* last."

Under this last agreement the Testator continued in possession to the period of his death, which happened on the *8th* of *January*, 1813. No conveyance was ever made; and, after the Testator's death, the devisees in trust under his will entered and took possession.

The bill filed by *Elizabeth Hulme*, the heir at law, prayed against the devisees an account and delivery of possession, and that *Packer*, (who was also made a Defendant,) might be decreed to execute to the Plaintiff a proper conveyance.

The points in the case were two :—

*First*, Whether the agreement of *June* 1811 had not been waived or abandoned by the Testator, in which case, his title to the estate in question depending solely on the subsequent agreement made after the

date of the codicil, that estate would clearly not have passed to the devisees under the will.

*Secondly*, If the agreement of *June* 1811 had not been waived, and if the subsequent agreement must be taken, not as substantive or independent of, but as having reference to, and continuing the effect of, the former, then whether the codicil did, under the circumstances, amount to a republication of the will.

(*N. B.* The first point being merely a question of construction upon the two instruments, as connected with the particular facts of the case, it has been thought unnecessary to detail the arguments used on either side in discussing it.)

*Hart*, *Agar*, and *Bell*, for the Plaintiffs:

As to the second point, which regards the legal effect of this codicil, it is to be observed that the will was executed before either of these agreements was entered into, and that the construction of the codicil, as operating a republication of the will, must depend altogether upon the intention which it manifests. It is not disputed that where a person devises all his real estates by his will, and afterwards makes a codicil duly executed, so as to pass real estates, confirming the will, the date of the will is brought down to the date of the codicil, so as to make the two one entire instrument, under which estates intermediately purchased will pass. This is, however, always provided the will is so framed as, in terms, to pass *all* the real estates. But that is still a question of intention; and, in every such case, the codicil is to be looked at, in order to see whether it affords any circumstance by which the general principle ought to be excluded.

1816.
HULME
v.
HEYGATE.

The case nearest to the present, although not completely in point, is that of *Lady Strathmore* v. *Bowes* (a), where a testator, having by will devised to trustees all his *freehold* and *copyhold* estates, in words sufficiently comprehensive to carry all the estates of which he was then seised, made a codicil by which he revoked the devise as to some of the trustees named in his will, and gave *his said* lands to the remaining trustees; and, upon the question as to after-purchased estates, whether it was his intention to pass by the codicil any thing more than would have passed by the will itself, it was held that the expression "his *said* lands," confined his meaning to the lands which he had at the time of making his will.

The present case greatly resembles that; for here the Testator has clearly indicated what estates he intended should pass to the uses of his will, by devoting the sum of £35,000 to be laid out in the purchase of lands to be added to those already devised by him, which shews the extent, in proportion to the bulk of his property, to which he meant the uses of his will to operate. He has further indicated the same intention by his codicil, in which he expressly mentions all the other estates purchased and contracted to be purchased by him since the date of his will, but says nothing about that estate which is the object of the present dispute, thereby, negatively at least, excluding it from the operation of his will altogether. He has not only done this, but more, by adding to the words in which he disposes of those after-purchased estates, a direction that the amount of the purchase monies for those estates should be deducted from the £35,000 so devoted as already mentioned, than which nothing can

(a) 7 T. R. 482.

be stronger to shew that he meant that sum of £35,000 to be the utmost extent in value of the property so limited.

It cannot be disputed that a testator may so qualify the effect of the general rule; and there is enough in the present case to shew that this Testator did intend so to qualify it.

Sir *S. Romilly* and *Tinney*, *Leach* and *Trower*, *Parker*, for the several Defendants.

The case of *Lady Strathmore* v. *Bowes* proceeded on this, that the only intention apparent on the face of that codicil was to change the trustees appointed by the will, leaving the will in all other respects to operate exactly as it would have operated if no codicil whatever had been made; and the expression used by the Testator, devising "his *said* estates" to those new Trustees, expressly confined its effect to that single object. That case, therefore, establishes no principle that can be applied to the decision of the present. If, at the time of making his will, this Testator had already contracted to purchase the estate in question, there is no doubt that, under the general words of the will, this estate would have passed, even though he had specified other estates contracted to be purchased by him, without mentioning this. If that would have been the effect of the will, there is no ground for contending that it is otherwise with the codicil. The codicil alters the will in one material respect, *viz.* by directing that certain sums subsequently laid out in the purchase of estates, shall be taken as part of the £35,000 devoted by the will to that purpose. There is no other alteration made by the codicil but this; and it expressly confirms the will in all other respects. The reason, then, why this

1816.

HULME v. HEYGATE.

particular estate was not noticed by the codicil is, simply, that the Testator did not mean the purchase money for this particular estate to be deducted out of the £35,000.

In *Pigott* v. *Waller* (a), it was determined that a codicil, duly executed to pass real estates, though relating only to personal estate, and containing no words of confirmation, amounted to a republication, so as to pass lands purchased in the interval, under a general devise in the will. In that case your Honor fully considered all the authorities. That of *Barnes* v. *Crowe* (b) was very strong as to the same point; and all the cases clearly establish that, unless the intention to restrict is *manifest*, the republication by codicil duly attested is entire, as to all after-purchased lands: In this view of the principle, the case of *Lady Strathmore* v. *Bowes*, rather tends to confirm it by way of exception. And, even in that case, the decision on which was affirmed upon appeal to the House of Lords (c), Lord *Thurlow* differed in opinion from the Judges, observing, "that a republication of a will of lands had always been held to speak of the time of republication, and that he knew no instance in which that rule had been departed from."

*Hart*, in reply.

It is a mere question of construction. The general rule is only founded on the presumption that the Testator looks to the intention which he had at the

(a) 7 Ves. 98. *De Bathe* v. *Lord Fingal*, 16 Ves. 167.

(b) 4 Bro. 2. 1 Ves. J. 486.

(c) *Bowes* v. *Bowes*. 2 Bos. & Pull. 500. *Vide* p. 505.

time of making the will as still existing at the time of making his codicil. But when there is any particular mode by which an intention is indicated to exclude this presumption, confining the operation of the will, either by inference or expression, to the estates which the Testator had at the time of making the will; in such case the codicil does not amount to a republication. On this codicil there is a clear intention to republish the will as to the estates there mentioned, but the intention is confined to those estates only. The general intention is absolutely rebutted by the manifestation of the particular intention. In all cases where there is any reasonable ground of doubt as to the actual intention, an heir at law is not to be disinherited.

*The* MASTER *of the* ROLLS,

(After deciding, as to the first point, that the agreement of *June* 1811, continued in force down to the date of the second agreement, and was varied, but not extinguished, by the modifications introduced by that second agreement, upon the ground, that the second agreement, necessarily depending on, could not exist or be enforced, except with reference to, the former, delivered his opinion on the second question as follows):—

I formerly had occasion to consider this doctrine very much at large, in the case of *Pigott* v. *Waller* (a), where I observed that the old cases (b), deciding against the constructive republication of a will, appeared to me more conformable to the Statute of

(a) 7 Ves. 98.

(b) *Lytton* v. *Lady Falkland*, 2 Eq. Ab. 768, cited 7 Ves. 117, &c.

1816.
HULME
v.
HEYGATE.

Frauds than those of later date (*a*); but I nevertheless held it to be a point now clearly established, as a general rule, that a codicil duly attested does amount to such republication. This is a point not controverted in *Lady Strathmore* v. *Bowes*, and fully recognised in the late case of *Goodtitle* v. *Meredith* (*b*), by Lord *Ellenborough*, who says that "the effect of all the decisions is to give an operation to the codicil *per se*, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless a contrary intention be shewn (*c*)."

Then what circumstances are those by which a contrary intention can be shewn? The Lord *Chancellor*, in the House of Lords, clearly laid down the principle according to which the case of *Lady Strathmore* v. *Bowes* was decided; observing, that "it could not be denied that other circumstances than those of locality in the description of the lands devised were sufficient to controul the operation of the codicil (*d*);" and, supposing that the Court of *King's Bench* had rightly interpreted the meaning of the word "said" in that codicil, there can be no question that the decision of the Court, founded upon that interpretation, was right.

In this case, no such expression as that is used, nor any equivalent to it; and I must absolutely deny the inference, that, because the testator has thought fit to specify some of the after purchased estates in this codicil, I am therefore to exclude all the others. To the

(*a*) Beginning with *Acherley* v. *Vernon*, 3 Bro. P. C. 107.

(*b*) 2 Maule & S. 5.

(*c*) P. 13, 14.

(*d*) 2 Bos. & Pull. 506.

1816.

HULME v. HEYGATE.

question, "Why does he expressly mention some, except for the purpose of excluding the others?" I answer, that the question would apply equally to the will itself, and tend to exclude all the estates whatever, except that which is there specified as being lately contracted to be purchased under a decree of the Court of *Exchequer*. It is not pretended that the will does not include all the estates which the testator had at the time of making his will, notwithstanding this specification. The same construction, therefore, applies when the will is, by the operation of the codicil, brought down to the date of the latter instrument. It is not here merely by implication, as in *Pigott* v. *Waller*, but by express limitation, that the general words must be taken to extend so as to comprise all the estates of the testator; and this is not to be restricted by the mere introduction of directions as to some specific parts.

This, then, is the construction that I find myself bound to adopt, even supposing that no motive can be assigned for the introduction of that specification; and, in this view of the case, it is not material whether the testator had, or had not, in contemplation, the distinction supposed on the part of the Defendants. It is not for them to shew that it was the testator's intention to *include* this estate in the general operation of his codicil, but for the Plaintiff to point out his positive intention to *exclude* it from that general operation. There is nothing in this case sufficient to shew the latter intention; and, therefore, this point also must be determined against the Plaintiff.

Bill dismissed.

1816.

ROLLS.
*March* 15.

## ASHBY *v.* PALMER.

Devise of real estate in trust to sell, and out of the money to pay debts, &c. and with the surplus to maintain and educate the daughter of the testatrix until twenty-one, or marriage. But if she should die unmarried under twenty-one, all such money as should remain in the hands of the trustees, or such parts of the real estates as should remain unsold, (if any), to be to the use of *A.*—The daughter lived to attain twenty-one. This is a conversion out and out, and the real estate remaining unsold at her death goes to her personal representative.

No presumption of election to take as real estate where there is incapacity, as lunacy.

Property not to be taken as it is, but as it ought to be at the death of the party from whom the representatives claim.

Question of a resulting trust only arises between the real and personal representative of the testator, not between the representatives of a party taking under the will.

ELIZABETH FIELDING made her will, dated 30th *March*, 1751, by which she gave, devised, and bequeathed to certain persons therein mentioned, their heirs, executors, administrators, and assigns, all her real and personal estate, in trust, to sell as soon as convenient after her decease, and, out of the money thereby raised, and with the rents, issues, and profits of the real estate, until sale, in the first place to pay and discharge all her debts and funeral expenses, and with the surplus, to bring up, maintain, and educate her daughter *Elizabeth*, in such manner as they should think most for her advantage, until twenty-one, or marriage; but, if she should die unmarried, under twenty-one, then, and in such case, all such money as should remain in the hands of the said trustees, and such part of the real estates as should remain unsold, (if any) at the time of her decease, and not applied in payment of her debts aforesaid, or in the education of her said daughter, should be, and remain to, and for the only proper use and benefit of, her sister, *Mary Perkins*, her heirs, executors, and assigns.

The Testatrix died in the year 1760, leaving her daughter, in the will mentioned, an infant. The trustees entered upon the real estate, and possessed themselves of the personal, and thereout paid the debts and funeral expenses. The daughter of the testatrix afterwards attained her age of twenty-one years, having previously become a lunatic, in which state she continued till her death, and died in 1803, unmarried, and intestate.

No part of the real estates were sold under the trusts of the will; and, after the death of the lunatic, the Defendant *Palmer*, her heir at law, entered into possession.

The Bill, filed by the next of kin of the lunatic, charged that the real estate was converted by the will into personal, and prayed a sale and distribution.

*Palmer*, by his answer, insisted that *Elizabeth Fielding*, the testatrix's daughter, had a right to consider the estates devised to be sold as real estates, and that, by having continued in possession, she must be taken to have so elected. He also relied on the testatrix's intention being that the estates should be sold only for the purpose of paying her debts; and alleged that *Elizabeth* did not become lunatic till after she attained twenty-one; but this was contradicted by the evidence on the part of the Plaintiffs, and unsupported by any for the Defendant.

*Hart*, *Wilson*, and *Bell*, for the Plaintiffs.

This is a conversion out and out. Where a testator has declared certain purposes to which the produce arising out of the sale of his real estate is to be applied,

1816.

ASHBY v. PALMER.

if some of those purposes fail, the part which was to be devoted to the purposes so failing results to the heir at law, but results to him as personal, and not as real estate. *Wright* v. *Wright* (a). There is nothing, however, to prevent a testator from devoting his whole real estate to be sold absolutely, so as to be considered in the first instance as converted into personal. The intention of the testatrix, in the present case, is manifest; and the conversion does not depend upon a mere rule of law authorizing the Court to declare it, but upon the express terms of the will. With regard to the clause, giving to the sister of the testatrix such part of the real estates as should remain unsold (if any) in the event of her daughter's dying under twenty-one and unmarried, no inference of intention, contrary to the general intention to sell out and out, can fairly be raised from it; for it only shews that the testatrix contemplated the accident of a premature death, which might prevent the sale, in which case, and in which case only, she directs that the trustees shall not proceed in the accomplishment of her object. The words "*if any*" shew, to the contrary of any such inference, that she looked to the entire conversion, provided her daughter lived long enough. Suppose she had married, and died under twenty-one, her husband might have claimed as administrator. Then the right of the present Plaintiffs is precisely the same.

As to her having elected to take as real estate, she was never capable of electing.

Sir *Samuel Romilly* and *Trower*, for the Defendant.

(a) 16 Ves. 188. and see *Hill* v. *Cocks*, 1 Ves. & B. 173. *King* v. *Denison*, ib. 260. *Kellett* v. *Kellett*, 1 Ball & B. 533.

1816.

ASHBY
v.
PALMER.

The property claimed by these Plaintiffs continued real estate during the life of the lunatic, and was so at the time of her death. In *Oxenden* v. *Lord Compton* (*a*), it was held that the property must be taken in the state in which it was left at the death of the party from whom the representatives claim; and, although in later cases that principle has been doubted by the present Lord *Chancellor* (*b*), and his doubts corroborated by your Honor in that of *Kirkman* v. *Mills* (*c*), yet the question remains untouched, as to what constitutes a conversion out and out, and where the conversion is only for a certain limited purpose. In the present case, the sole objects of conversion were the payment of debts, and the maintenance and education of the daughter till twenty-one, immediately after which follows the direction that, in case of her death under twenty-one and unmarried, all such money as should then remain in the hands of the trustees, together with the real estate remaining unsold and not applied towards either of these objects, should go to the testatrix's sister,—a singular provision, supposing she could have intended a conversion of the whole real estate. The testatrix's daughter was her heir at law, and would therefore have taken the real estate at all events; and it was clearly in her contemplation that her sister might, in the event which she supposed, also take it as land. How then can it be said that she absolutely meant it should be converted into money? The question really being, whether it is not manifest that the testatrix spoke of it as money only *quoad* certain purposes, but had no intention of conversion be-

(*a*) 2 Ves. 69. Vide Lord *Compton* v. *Oxenden*, ib. 261. *Walker* v. *Denne*, ib. 338.

(*b*) *Wheldale* v. *Partridge*, 1 Ves. 227.

(*c*) 13 Ves. 338. also in *Biddulph* v. *Biddulph*, 12 Ves. 160.

1816.

ASHBY v. PALMER.

yond these purposes,—whether it was not manifestly her intention to give the whole property to her daughter, to be enjoyed by her representatives in whatever character it should happen to be left by her at her death.

Suppose the testatrix's sister had died in her lifetime, and the daughter had died afterwards, under twenty-one and unmarried. The question would then have been between the real and personal representatives of the testatrix, and, according to all the cases, it must have been held a resulting trust for the heir at law. Yet now the Court is called upon to decree a sale in favour of the personal representative against the heir at law. And where is the difference? Is there any person existing, who has a right by gift from the testatrix to any part of this property? There is no such person; and, if not, according to the authority of *Chitty* v. *Parker* (a), there is no person who has a right to apply to have it converted into money.

It is not attempted to be denied that the daughter held such an interest as gave her the right to demand that the property should be retained in whatever character she might have elected to take it. Her incapacity to exercise this power cannot make any essential difference, and she must be taken to have elected according to the state in which the property is found at her death.

*The* MASTER *of the* ROLLS, stopping the reply.

This case does not involve any difficulty whatever. Land, once impressed with the character of money,

(a) 2 Ves. Jun. 271.

must remain so impressed until some person elects to take it in its original character, as land. This is not the case of a resulting trust, which can only come in question as between the real and personal representatives of the *testator*, and is that, where, though the real estate is devoted to be sold, yet the entire produce is not devised to any one person, but particular purposes are pointed out to which it is to be applied. In such cases, if the purposes are fully answered without reverting to a sale, then, on a question between the heir at law and the next of kin of the testator, the former is held entitled by way of resulting trust. The single question *here* is, in what character the *devisee* took the estate. No doubt, the testator may dispose of his property as he pleases. He may say, his devisee shall take it *only* as money;' and, wherever he has so expressed his will to be, there is no necessity that it should be actually converted in order to make it pass as money. Until election made to take it as land, it must so pass; and, whenever the devisee dies, it therefore becomes necessary to revert to the will, in order to see how the testator has given it. In the will now before me, it is clearly given by the testatrix to her daughter *only as money*. When she arrived at twenty-one, it might be that the whole would remain unsold, and then she might have elected to take it as land; or, if she had kept it unsold, being competent to make an election, she might have been presumed to have so made her election. Here she was manifestly incompetent to make any; and it is as if she had died before the time arrived at which she could have elected. With regard to the conditional clause, there is no inconsistency in giving the same thing to one person as money, to another as land if not already converted into money,—in declaring that it shall be converted *quoad* the first taker, not *quoad* the second. In this case, the testatrix has ex-

1816.

ASHBY v. PALMER.

pressly said that such is her will, and the authorities cited have therefore no relation to it.

"Declare that the intestate, *Eliz. Fielding*, took the real estate of the testatrix as personal property. Refer it to the Master to take an account of the real estates of the testatrix which passed by her will in favour of the said intestate, and of the rents and profits thereof come to the hands of the Defendant, *Palmer*, previous to the appointment of a receiver in the cause. The Master to tax all parties their costs of the suit, and the Defendant to be at liberty to retain what shall be so taxed for his costs out of what the Master shall find due from him, or take the said account. The residue to be paid to the Plaintiffs in four equal parts. The Defendant to convey and assign the premises, and to deliver up all title deeds, now in his custody or possession, relating thereto."

*March* 2—5.

## ELLIOT v. HALMARACK.

Commitment for contempt in assaulting the deputy messenger in discharge of his duty.

MOTION on behalf of the Messenger to the Great Seal, that the Defendants in this cause, and one *Griffiths*, a constable, might stand committed to the *Fleet*, for a contempt in assaulting the deputy messenger, whilst in the execution of his duty, and obtaining the rescue of one of the Defendants, who had been attached for want of answer.

This motion was supported by affidavit of the deputy messenger, stating the circumstances of the assault and rescue.

1816.
ELLIOT v. HALMARACK.

Sir S. *Romilly*, in making this application to the Court, stated the only question to be, whether the order should be *nisi* or absolute in the first instance. And the motion was then directed to stand over, to search for precedents.

March 5.

Sir S. *Romilly*, upon again mentioning the matter, referred to Lord *Clarendon*'s order (*a*), and *Beames*'s Notes (*b*), observing, that the oath of one person was sufficient to ground a commitment in case of beating or abusing a party serving the process of the Court, notwithstanding the case in *Atkyns* (*c*); and, upon the following cases being cited from the Register's book, viz. *Williams* v. *Johns*, 12th *Feb.* 1773 (*d*), and *Morgan* v. *Jones*, 1744, the Lord *Chancellor* made

(*a*) General order in Chancery, (*Beames*'s edition,) p. 204.

(*b*) Notes 118, 119, ib. p. 204, 205.

(*c*) *Anon.* 3 *Atk.* 219.

(*d*) *Williams* v. *Johns*, 12th *Feb.* 1773. *Reg. Lib. B.* 1772. fo. 123. It appears that the Defendant, on being served with the subpœna, having compelled the person serving it to eat the parchment and wax of the process, had beaten and kicked such person very severely; and, considering him as dead, had directed his servants to throw the body into a river. It was therefore moved that the Defendant, and his son, (who had assisted) might stand committed to the *Fleet*, "which is ordered accordingly, unless the said Defendants, having notice thereof, shall, on the 10th day of *March* then next ensuing, shew unto the Court good cause to the contrary;" service of the order at the dwelling-house being directed to be good service.

10th *March*, 1773, *Reg. Lib. B.* 1772, fo. 155. The order was made absolute, upon affidavit of service of the order of 12th *Feb.* by throwing it into the dwelling-house of *Johns*.

1816.

ELLIOT v. HALMARACK.

the order, unless cause shewn to the contrary, within three weeks.

The application against *Griffiths*, was founded only on the deponent's information, that the said *Griffiths* [illegible] present during the time that he was assaulted, and called on all persons present to assist him; and that he did not assist, or attempt to do so. No order was made against him.

ROLLS. *Feb.* 26.

## CLARKE v. BUTLER.

Testator bequeaths as follows:—"As to all that my leasehold house in *L.* and all my household goods and furniture there and at *S.* and as to all my plate, linen, china, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estate, &c. I give and bequeath the same to *A.*" By a codicil, he revokes the bequest "of the residue" to *A.* and gives "the residue of his said personal estate" to *B.* The gift of the general residue only, and not of the articles enumerated, is revoked by this codicil.

JOHN *Clarke*, by his will, dated 31st *October*, 1812, after devising his real estates to trustees (whom he also named his executors) gave and bequeathed the sum of £6000, *five per cent.* Bank Annuities to his niece, *Caroline Jane Fountain*, for her own use and disposal; and, after giving several legacies to different persons, and directing that they should be paid in full, and without any deduction on account of legacy duty, gave and bequeathed as follows:—"And as to all that my leasehold house in *London*, and all my household goods and furniture there and at *Sawbridge*, and as to all my plate, linen, china-ware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estate, whatsoever and wheresoever, not hereinbefore by me disposed of, after the

payment of my just debts, legacies, and the several duties thereupon, and my personal expences, and the charges of proving this my will, I give and bequeath the same to the said *Caroline Jane Fountain*, to and for her own absolute use and disposal."

The Testator afterwards made a codicil to his will, dated the 29th of *March*, 1813, as follows:—

"I do hereby revoke the bequest of the residue of my personal estate, and of the £6000 Navy *five per cent.* Annuities (in my will improperly called *five per cent.* Bank Annuities,) to *Caroline Jane Fountain*, in my said will mentioned, and in lieu thereof I give her the sum of £1000 sterling, to be paid to her, her executors, administrators, or assigns, within one month after my decease. And I give and bequeath the residue of my said personal estate and the said stock unto *Richard Butler* and *Robert Butler*, the trustees and executors in my said will mentioned, in trust to invest such residue in the purchase of other stock in the public funds, and to receive the interest, dividends, and annual produce thereof, and of the said navy *five per cents.* and to pay over the same to the said *Caroline Jane Fountain*, and her assigns, during the term of her natural life."

By another testamentary writing, the testator gave some further specific legacies to the persons therein named; and (amongst others) gave a little case with pens and ink in a table-drawer at *Sawbridge* to the said *Caroline Jane Fountain*, but did not thereby revoke or alter his will or codicil.

The question was, whether "the leasehold house in *London*, the household goods and furniture there, and

1816.
CLARKE v. BUTLER.

at *Sawbridge*, plate, linen, china, pictures, live and dead stock" given by the testator's will to his niece, *Caroline Jane Fountain*, were the absolute property of the said *Caroline Jane Fountain*, or whether the bequest was affected by the revocation in the codicil, and the effects thereby given to be considered as part of the residuary estate.

*Hart* and *Seton*, for the parties interested in the residue as given by the codicil.

Sir *S. Romilly*, *Heald*, and *Blake*, for the Defendant, *Caroline Jane Fountain*.

*J. Martin*, for the executors.

On the part of the former, it was argued, that where a specific enumeration of articles is followed by the words "and all the rest and residue," that specific enumeration must be construed as forming part of the general residuary clause, and cannot be distinguished from it; and the separate gift of the "case with pens and ink in the table-drawer at *Sawbridge*," made *after* the revocation by the codicil, was relied on as sufficient evidence that the testator himself apprehended the former bequest, of furniture at *Sawbridge*, to have been revoked by the codicil, as otherwise the ink-case would have passed under it.

On the part of Miss *Fountain*, it was contended, that without the words "rest and residue," the bequest of all the enumerated articles would have been clearly specific, and the nature of such a bequest could not be altered by the mere addition of those words, the natural operation of which was to extend the former bequest, but not to incorporate themselves with

it. That the gift of the leasehold house and furniture was by a distinct sentence from that of the plate, linen, &c. and, therefore, that if the latter part of the clause must be taken to sink in the general words at the conclusion, the same construction could not be fairly extended to the preceding. That the words of the codicil revoked the will as to the bequest of the "residue" only, whereas, if the testator had meant to include in that revocation the enumerated articles, he would have again enumerated, for the purpose of revoking, as he had originally done for the purpose of giving them. That nothing was to be inferred from the subsequent gift of the ink-case, as it might have happened not to remain at *Sawbridge* at the testator's death, or he might have supposed it would not pass by the words "household goods and furniture."

*The* MASTER *of the* ROLLS

Thought that the bequest comprised two distinct sentences; that it was clearly the intention of the testator to give specifically his leasehold house and furniture, and that, although that intention appeared somewhat doubtful as to the particulars enumerated in the second division of the clause in question, yet, from the nature of those particulars, it appeared probable that he considered them as specific also.

"Declare, that by the codicil the bequest of the general residue only, and not the bequest of the house in *London*, the household goods and furniture there and at *Sawbridge*, plate, linen, china, pictures, live and dead stock, to the Defendant, *Caroline Jane Fountain*, was revoked, and that the said Defendant is entitled to the said house and furniture, plate, linen, &c."

1816.

ROLLS.
*March* 11.

Issue directed to try whether *F. M.* was living at the death of his father, the testator, the father and son having been shipwrecked together on their voyage from *India*, and all on board having perished.

## MASON *v.* MASON.

BRYANT Mason of *Tumlook*, in *Bengal*, by his will, dated the 23d of *April*, 1806, gave and bequeathed all his estate, both real and personal, (except such parts as he should thereafter specifically dispose of,) to certain persons therein named, their heirs, executors, &c. upon trust, to pay to each of his children who should be living at the time of his death £5000, to be paid to the sons at twenty-one, and to the daughters at twenty-one, or marriage, respectively, with benefit of survivorship, in case any should die before their portions were respectively payable. And, as to all the residue, he gave and bequeathed the same unto and among all and every of his sons (except his son *Francis*) who should be living at his death, in equal shares, with the same directions as to the time when the same should become payable, and with the same benefit of survivorship, as had been given with respect to their before-mentioned portions of £5000. And the testator appointed the said trustees executors of his will.

In the month of *January*, 1809, the testator, who was at that time a middle-aged man, embarked, with his son *Francis*, on board the *Calcutta*, on a voyage to *England*. The ship sailed the same month, was lost on her homeward voyage, and all on board perished.

The Decree made on the hearing of this cause directed (among other things) that the Master should enquire what children of the testator were living at his death; and the Master, by his Report, stated, that he

1816.
MASON v. MASON.

found the testator had *nine* children, *eight* of whom (who were the infant Plaintiffs, and the Defendant, the eldest son and heir at law,) were living at the death of the testator: and he further stated, that the testator's second son, *Francis*, embarked with his father, and was lost at sea, as above-mentioned, and that all persons on board perished; and he was, therefore, unable to state whether the said *Francis* survived his father or not.

The cause coming on upon further directions, the question, necessary to be determined before the clear residue of the testator's estate could be ascertained, was respecting the legacy of £5000 to which *Francis* was entitled, *in case* he survived his father, and which, in that case, would be distributable among *all* the surviving children; but if, on the contrary, the father was the survivor, the legacy lapsed, and fell into the general residue; consequently, was divisible among the sons, to the exclusion of the daughters.

As it was impossible, under the circumstances, to obtain any evidence of the fact, it is evident that the question, if to be decided at all, was to be decided altogether on the ground of presumption.

*Wetherell*, in support of the presumption to be raised in favour of the daughters, who claimed their shares of this legacy in the event of *Francis* having survived his father, referred to the well-known case of General *Stanwix*, and to Mr. *Fearne's* argument, (*a*) intended to establish, in that case, the claim of the daughter's

(*a*) *Fearne's* Posth. Works, p. 38. The question in that case was never decided, the parties having entered into a compromise at the recommendation of the Court.

1816.
MASON
v.
MASON

representatives. He also cited the *Code Napoleon*, Liv. iii. Tit. i. c. i. (*a*), and relied on the express terms of the rule of the civil law which says, that "where no evidence is to the contrary, a child shall be presumed to have outlived its parent," as affording reasonable grounds for presumption to be adopted by our own Courts of Justice under similar circumstances; at the same time admitting that there did not exist, in the present case, the strong probability which arises in cases of extreme decrepitude contrasted with the full vigour of life.

Sir *Arthur Piggott* and *Shadwell*, for the Defendant.

(*a*) "De l'ouverture des successions, et de la saisine des héritiers."

Art. 720.—"Si plusieurs personnes respectivement appellées à la succession l'une de l'autre, périssent dans un même évênement, sans qu'on puisse reconnaître laquelle est décédée la première, la présomption de survie est déterminée par les circonstances du fait, et à leur défaut, par la force de l'âge et du sexe."

Art. 721.—"Si ceux qui ont péri ensemble avaient moins de quinze ans, le plus âgé sera présumé avoir survécu.

"S'ils étaient tous au-dessus de soixante ans, le moins âgé sera présumé avoir survécu.

"Si les uns avaient moins de quinze ans, et les autres plus de soixante, les premiers seront présumés avoir survécu.

Art. 722.—"Si ceux qui ont péri ensemble, avaient quinze ans accomplis et moins de soixante, le mâle est toujours présumé avoir survécu, lorsqu'il y a égalité d'âge, ou si la différence qui existe n'excêda pas une année.

"*S'ils étaient du même sexe, la présomption de survie qui donne ouverture à la succession dans l'ordre de la nature, doit être admise: ainsi le plus jeune est présumé avoir survécu au plus âgé.*"

Sir *Samuel Romilly* and *Cooke*, for Plaintiffs in the same interest with the Defendant.

The rules cited from the Civil Law and the *Code Napoleon* have no bearing on the present case, even if it were possible to contend that the presumption upon which they proceed is so founded on universal principles that it ought to be adopted and become the law of this Court. The legacies of £5000 are here given to each of the testator's children "who should be living at the time of his death." To entitle any person to take under this bequest, it is necessary that he should make out the fact that the child under whom he claims was actually living at the time of the testator's death. This is not a question of presumption, but of positive proof. General *Stanwix's* case was a case of intestacy, therefore clearly distinguishable; and that case was never decided, being compromised at the recommendation of the Court. In this case there can be no compromise, because some of the parties are infants. But here the burthen of proof rests altogether on the representatives of the legatee, who claim the legacy as given to him in the event of his having survived. They cannot prove that he survived. The legacy must therefore be considered as having lapsed, and fallen into the residue. The English law knows of no such principle as presumption in a case of this nature.

*Wetherell*, in reply.

We do not contend for this as an established rule of law, but as constituting the only evidence in a case which admits of no positive proof, and must therefore be decided upon the mere strength of presumption. The peculiar constitution of English Courts of Justice re-

1816.

MASON v. MASON.

quires, in all cases, the best evidence which the nature of the case will admit; and the slightest degree of evidence is sufficient to turn the balance where none exists in the other scale. The real difficulty, after all, is to say which of these two persons survived. This it is impossible to say with any certainty as to the fact. Then, what is the probability? On the other side they say it is incumbent on us to shew our qualification: but this is only changing the terms of the question, not the question itself. The nature of the case precludes positive and demonstrative evidence; but it does not take away the rights of the parties. The English law does not lay down as a principle that you must prove the facts of heirship, of non-alienage, &c. It is sufficient that those facts are presumed; nor does it necessarily follow, because the burthen of establishing an affirmative proposition lies on your side, that you must make out that affirmative to demonstration. In nine cases out of ten, where the Court takes for granted a fact which rests on presumption, and is not disputed, it would be impossible to demonstrate the fact.

No other course can be pursued in the present case but either for the Court at once to adopt the rule of the civil law for the ground of presumption, or to send the question to an issue.

*The* MASTER *of the* ROLLS.

There are many instances in which principles of law have been adopted from the Civilians by our English Courts of Justice, but none that I know of in which they have adopted presumptions of fact from the rules of the Civil Law. In *General Stanwix*'s case, I thought the stress of the argument to be in favour of the re-

presentatives of the Father. There were three contingencies; either the Daughter survived the Father, or the Father the Daughter, or both perished at the same instant. In the first of these cases alone would the representatives of the Daughter have been intitled, those of the Father in either of the two last. There were, therefore, two chances to one in favour of the latter. In the present case, I do not see what presumption is to be raised; and, since it is impossible you should demonstrate, I think that, if it were sent to an issue, you must fail for want of proof.

*For the Plaintiff.*

Suppose the case of a tenant by the curtesy, or of a brother of the half blood. Neither of these could be decided but by a jury; yet they must be decided.

*For the Defendant.*

In this case there is nothing that can be sent to a Jury.

*The* MASTER *of the* ROLLS,

On the ground now taken for the Plaintiff, I certainly cannot refuse an issue if insisted on by either party.

The Counsel for the Plaintiff continuing to require it, an issue was directed to try, Whether *Francis Mason* was living at the death of the Testator.

1816.

Rolls.
*March* 18, 19.

## BULL *v.* KINGSTON.

Bequest of personal property in trust for *A.*, (a married woman), for her separate use; with a power of disposing by will, (except to particular persons). "And in case she dies without a will, I give all that may remain at her decease to *B.*" followed by a gift of "all the rest and residue" to *A.*, who is appointed executrix.

*A.* takes the absolute interest in the property, not a power of disposing merely. And the gift to *B.*, of "all that may remain at her decease," is void for uncertainty.

Legacy to an executor, who is also a trustee, excludes him from the beneficial interest in the residue, unless expressly given.

*ANN ASHBY*, spinster, by her Will, gave the sum of £1500, Bank Annuities, to *John Earl Talbot*, his Executors, &c. in trust for her sister *Charlotte Williams*, for her separate use; and "all other sums that may be due to her," she left in trust with the said *John, Earl Talbot*, for the use of her said sister.

Then, after giving several specific legacies to her godson *William Ashby* and others, the Testatrix proceeded as follows: "What I have not otherwise disposed of, I give to my said sister the unlimited right of disposing of by will, excepting to *E. P.*, or to any child of hers, or to any person in trust for any one belonging to her; and, in case my said sister dies without a will, I give all that may remain of my fortune at her decease to my godson *William Ashby*. The rest and residue of my fortune I give to my sister *Charlotte Williams*, making her the sole executrix of this my last will and testament."

At the time of making this will, and of her death, which happened in 1791, the Testatrix had standing in her name, together with other stock, the sum of £3000, Bank Annuities, £1500 of which she was entitled to under the will of her mother, for her own

use, and the remaining £1500, under the same will, sa Executrix, to be transferred to the said *John*, *Earl Talbot*, as Trustee for the sole and separate use of the said *Charlotte Williams*, who was a married woman; but the transfer of which had never been effected.

*Charlotte Williams* proved the will of her sister *Ann Ashby*, and possessed herself of her personal estate, and of the entire sum of £3000, which she shortly after transferred into the name of the said *Earl Talbot*, who executed a declaration of trust of the same.

By her Will, dated the 16th of *July*, 1793, the said *Charlotte Williams*, being still under coverture, gave several legacies, and among the rest a legacy of five guineas, to *John Kingston*, (whom she appointed Executor), and then proceeded, "And as for all the rest and residue of my estate and effects, Bank Stock, Bank Annuities, India Stock, and all my household furniture, plate, linen, china, and every other thing which I may be possessed of or entitled to at my death, I give and bequeath the same to the said *John Kingston*, his executors, &c. in trust to permit my husband to receive the interest and dividends for his life;" and, in case he should die without having any children, upon trust to divide and distribute the residue of her estate and effects as therein mentioned. The Testatrix then gave several other legacies; among the rest, to the said *John Kingston*, the further legacy of £500, together with her household furniture, and every legacy thereby given, in case the respective legatees should die before they became payable.

By a Codicil, dated the 16th of *July*, 1793, the

1816.
Bull
v.
Kingston.

Testatrix gave several additional legacies, and confirmed her will in all other respects.

The testatrix *Charlotte Williams* died shortly afterwards, and the Defendant *Kingston* proved her will and codicil. Sir *William Williams*, the husband of the Testatrix, survived his wife, and died intestate, and without children. The present suit was instituted by the personal representative of Sir *William Williams*, claiming to be entitled, under the will of *Charlotte*, to the absolute beneficial interest in all such parts of her personal estate and effects as were not specifically disposed of.

The Defendant *William Ashby*, by his answer, insisted that the testatrix *Charlotte Williams*, had not, by her will and codicil, made a complete disposition of the personal estate and effects left by the testatrix *Ann Ashby*; and therefore claimed all such right and interest in the said personal estate and effects undisposed of as he should appear to be entitled to.

Sir *S. Romilly* and *Horne* for the Plaintiff.

The will of *Ann Ashby* having given to *Charlotte Williams*, first, a power of disposing, and, in default of her executing that power, the absolute interest in the property to be disposed of; the will of *Charlotte Williams*, if not a valid execution of the power, is an effectual disposition of the property by virtue of the residuary bequest. *William Ashby* can claim nothing, except in the event of her dying intestate. The power is to be considered only as re trictive of her right to dispose in favour of certain persons thereby expressly excepted. The executor cannot take, being constituted a trustee, and having a legacy.

Sir *Arthur Piggott* and *Barber*, for the Defendant,



The power given to *Charlotte Williams*, by the will of *Ann Ashby*, is a power to dispose of the property of *Ann Ashby*, not of her own property; but the will of *Charlotte Williams* disposes of her own property only, and is therefore no execution of the power. Then the gift to *William Ashby* is perfectly consistent with the right of *Charlotte Williams* to dispose, if she pleases. Till she dies, *non constat* whether she will exercise that right or not. Then, what becomes of the property in the interim? It is left undisposed of during the life of *Charlotte Williams*; and the residuary clause is introduced to supply the deficiency. This is the only construction by which the entire will can be rendered effectual.

Then, what has *Charlotte Williams* done by her will? That will contains no reference to the power, and would be equally applicable if she had taken nothing whatever under the will of *Ann Ashby*. It has been decided in many cases that such a power is not executed by a general bequest of "my estate and effects," which will pass only that of which the testator has the absolute property. *Roche* v. *Haynes* (*a*). The power must be executed, in order to pass the property which is the subject of it; and it can only be executed either by express reference, or by the plainest inference. Here, there is a gift over in the event of her not making a will, *i. e.* a will in execution of the power. If she takes any interest at all in the property, it is an interest liable to be devested in the event of non-execution of the power. The testatrix means that, if *Charlotte Williams* disposes of the pro-

(*a*) 8 Ves. 588.

1816.

Bull v. Kingston.

perty in question, in that event, *William Ashby* shall be entitled to nothing; but that, if she does not dispose of it, in that event, it shall not fall to the testator's next of kin, but *William Ashby* shall have it. This construction is rendered more probable by the exclusion of certain relations of the testatrix, who might by possibility have been the next of kin.

In order to support the argument contended for on the other side, this residuary clause, in favour of *William Ashby*, must be considered as a mere nullity, and erased altogether. There is no substantive bequest to *Charlotte Williams*. If not a mere power, it is nothing.

*Hart*, for the Defendant, *Kingston*,

Contended that he was not clearly excluded from the beneficial interest under the will; that the gift of a legacy to an executor does not so operate where the context shews a different intention; and that there was enough in the will of *Charlotte Williams* to shew that she meant to give to her executor whatever she had the power to dispose of.

Sir S. *Romilly* in reply.

The question is, whether the will of *Ann Ashby* has given a power which must be strictly executed in order to pass the property, or whether it amounts to any more than a mere declaration that the residue shall go over in the event of *Charlotte's* dying intestate. The will, in the fir t place, gives, by words sufficiently extensive to pass all the personal property of the testatrix, to *Lord Talbot*, in trust for the separate use of *Charlotte Williams*. All money due to the tes-

tatrix, means the money in the funds, that having constituted the whole of her property. Then, having given all already, the gift of all that might remain, in case of her dying intestate, must be considered as void, from uncertainty as to the amount. The bequest of all the rest and residue, though made by the same instrument, must, in order to give effect to it, be considered as distinct from, and subsequent to the former part of the will; therefore, amounting to a reservation, or if not to reservation, at least as explaining the testatrix's view of her former disposition as not including the residue. In either view of the case, *Charlotte Williams* takes the absolute interest.

*The* MASTER *of the* ROLLS.

The executor of Mrs. *Williams*, in this case, is both a trustee and a legatee under her will. He, therefore, cannot claim the beneficial interest in the residue.

With regard to the residuary clause in the will of *Ann Ashby*, it is impossible to make sense of the will if that clause is to be taken as distinct from what goes before it. It is evident the testatrix perceived a defect in her intended disposition of the entire property in favour of Mrs. *Williams*, and that she had only given a power where she meant to give the absolute interest. To supply that defect, she gives the residue by the clause in question; and then the will is to be read as if it stood thus:—"I give to *Charlotte Williams* the residue of my estate, together with the right of disposing of the same by will, except to *E. P.*; and if she dies without a will, then I give whatever may remain at her death to *William Ashby*." This makes the whole intelligible and consistent. She gives

1816.

Bult v. Kingston.

to *Charlotte Williams*, as a married woman, the right of disposing by will of the property vested in her, independently of the controul of her husband; as was done in the case of *Hales* v. *Margerum*; (a) and she intended, at the same time, that if any thing was left undisposed of by her, it should go to *William Ashby*. But this is an intention that must fail on account of its uncertainty. *Charlotte*, therefore, took the absolute interest in the property, which, as to all the parts which were not specifically disposed of by her will, passed to her husband, and from him to the present plaintiff, his personal representative.

(a) 3 Ves. jun. 299.

Rolls.
*March* 19, 20.

## CHRISTOPHERSON v. NAYLOR.

Bequest "to each and every the child and children of my brother and sisters which shall be living at the time of my death; but, if any child or children of my said brother and sisters shall happen to die in my life-time, and leave issue, then the legacy or legacies hereby intended for such child or children so dying, shall be for his, her, or their issue." The issue take only by substitution. Therefore, only the issue of such children as were living at the date of the will are entitled in the event of the death of their respective parents during the testator's life-time.

*Qu.* If the second clause had stood alone and independent of the preceding.

JONATHAN *Fallam*, by his will, after directing his debts and legacies to be paid, and after giving a freehold estate and pecuniary legacy to his nephew *J. F.*, devised and bequeathed all other his freehold and leasehold estates, furniture, goods, and chattels, to

trustees, for sale, and out of the monies arising by sale, after payment of his said debts and legacies, upon trust to pay, and he thereby gave and, bequeathed, the sum of £800 "to each and every of the child and children of my brother and sisters, *John Farlam*, *Esther Graham*, *Martha Finlayson*, and *Tamar Turnbull*, which shall be living at the time of my decease, except my nephew, *J. F.*" for whom he had already provided as aforesaid. "But if any child or children of my said brother and sisters or any of them (besides the said *J. F.* my nephew,) shall happen to die in my life-time, and leave any issue lawfully begotten of the body or bodies of any such child or children living at or born in due time after his or their decease, then and in such case the legacy or legacies hereby intended for such child or children so dying shall be upon trust for, and I give and bequeath the same to his, her, or their issue; such issue taking only the legacy or legacies which his, her, or their parents or parent would have been entitled to, if living at my decease."

*J. Farlam*, *E. Graham*, and *T. Turnbull*, died in the life-time of the Testator, each leaving issue, which issue survived the Testator. *M. Finlayson* also died in the Testator's life-time, leaving three children, all of whom likewise died in his life-time, and left issue; and the Bill was filed by the issue of these three children, claiming to be entitled, in right of their respective parents, to the three several legacies of £800 to which their respective parents would have been entitled, if living at the testator's decease, and insisting that, according to the construction of the will, and the manifest intention of the testator as apparent therefrom, the lawful issue of such child or children of the testator's brother and sisters who died in his life-time, either previous or subse-

1816.

CHRISTOPHERSON v. NAYLOR.

quent to the date and execution of his said will, were all equally entitled to the legacies thereby bequeathed, and to the full receipt thereof, and that it could not be reasonably presumed from any matter contained in the will, that the testator intended to exclude the plaintiffs from receiving any such legacies.

To this Bill, the trustees, (who were also residuary legatees,) put in an answer, insisting that the plaintiffs were not entitled to the several legacies claimed by the bill in right of their respective parents, such parents having died before the making of the testator's will, and that, according to the true construction thereof, and the intention of the testator, no issue of any deceased children of the testator's brother and sisters were entitled in right of their deceased parents to the legacies of £800 thereby given to such children, unless the children in whose right they claimed were living at the time when the testator made his will.

Sir S. *Romilly* and *Phillimore*, for the Plaintiffs.

The question in this case is, whether, with reference to the principles on which wills are construed, the words of the present will are not to be understood as indicating the testator's intention to give to all the children of his nephews and nieces who should be living at his death, without distinction as to the accidental circumstance of the father or mother of those children being alive or dead at the time of making his will. The words "*shall* happen to die" do not more necessarily imply a future event than the words "*to be* begotten;" yet it is well settled that a gift to children "to be begotten" will include those who are already in *esse*. *Heb-*

*blethwaite* v. *Cartwright* (*a*), referring to Co. Litt. 20, the case of a limitation *hæredibus quos ille de corpore procreaverit*. So in the late case of *Doe* v. *Hallett* (*b*). The entire stock was the object of this testator's bounty, not any of the individuals who composed it. The family was numerous, so much so, that it was probable he might not know, at the time of making his will, who were dead, and who living. He, therefore, introduced the clause in question, for the purpose of bringing in the issue of any of the children who might happen to die before him; and it is monstrous to imagine that he meant to exclude any upon so fortuitous a circumstance as the death of the parent happening before or after the date of the will. In *Clarke* v. *Blake* (*c*), the bequest was "to such children as should be living at the death of *A.*;" and a child *en ventre sa mere* at that time was decreed to take, Lord *Thurlow* being of opinion that, although not within the strict meaning of the words, the solid ground of construction was, to consider whether it was not within the testator's intention to provide for *all* the children.

*Horne*, for the residuary legatees.

The Plaintiffs are not entitled, either according to the strict meaning of the words, or by their acknowledged import, or by analogy to the cases.

The first clause, constituting a bequest to persons expressly described as the children of the testator's brother and sisters, no persons could take under it, who were not children living at the time of the tes-

(*a*) Forr. 32. *Hewet* v. *Ireland*, 1 P. W. 426. *Gore* v. *Gore*, 2 P. W. 33. *Cook* v. *Cook*, 2 Vern. 545.

(*b*) 1 Maule and S. 124.

(*c*) 2 Bro. 320.

1816.

CRISTOPHERSON *v.* NAYLOR.

tator's making his will. The very exception of the testator's nephew *J. F.*, who was then living, shews that he contemplated such children as were then living; and it is the same as if the testator had given to them *nominatim.* "The child or children which shall be living at my decease." How can this be applied to those who were actually dead when the clause was framed? It cannot, by any violence of construction, be turned to the service of any but those who were then living. Then follows the second clause, which refers to the former; giving the legacy or legacies *thereby intended* for any child or children who should happen to die in his life-time to the issue of *such* child or children so dying. If no child or children were *intended* to take but such as were living at the date of the will, it is evident that no issue of any child or children, not living at the date of the will, can be entitled under this clause. The substitution is for that class of parents already designated, and no others; and the second clause leaves the question exactly where it stood upon the first.

There is no doubt that, according to the general rule of law, a legatee must be in existence at the time the legacy is given, or it is altogether void. There is nothing in this will to indicate a contrary intention; and the principle of analogy does not apply to a case like the present.

Sir *S. Romilly* in reply.

That which we contend for is, that the testator intended all the children living at his death to take equal legacies; and the issue of all such as should be dead before him, to take the legacies to which their parents would respectively have been entitled, had they sur-

lived. To exclude this intention from taking effect, is to decide that the words must be construed according to their strict import. The parents, undoubtedly, could not themselves have taken if they were already dead when the will was made, any more than if they were then living, but died in the testator's life-time. But when the testator goes on to say, If any shall happen to die in my life-time, the legacies of such so dying shall go to their issue; there is no greater violation of the strict import in construing it as if he had used the words, "if any shall happen to be dead in my life-time," than there was in the cases cited; and the principle of those cases, which is to give effect to the apparent intention, operates equally in the present. There is no distinction between them on any sound principles of construction. That of *Hewett* v. *Ireland* (a) is indeed stronger than this, being the construction of a *deed*. There it was held that "such children as shall be begotten" must be construed "as shall have been begotten;" why not, in this, "such as shall have been dead?"

*The* MASTER *of the* ROLLS.

The question is, whether there is not, in this case, a substitution; and therefore it comes to this—not what description of issue could take under the second clause, supposing it an original substantive limitation; but what description of parents might have been taken under the first?

---

*The* MASTER *of the* ROLLS.

*March* 20.

The question, in this case, does not depend on the words "*shall* happen to die in my life-time." Though,

(a) 1 P. W. 426.

1816.

CHRISTOPHERSON v. NAYLOR.

according to strict construction, importing futuri those words might have been understood as speaking of the event, at whatever time it may happen. But the context necessarily excludes this construction. The nephews and nieces are, here, the primary legatees. Nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand. But, of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will. The issue of those who were dead at that time can, consequently, shew no object of substitution; and to give them original legacies would be, in effect, to make a new will for the testator.

Therefore, the Bill must be dismissed.

1816.

THE ATTORNEY-GENERAL, at the relation of the Master, Fellows, and Scholars of TRINITY COLLEGE, CAMBRIDGE, and of the Rev. THOMAS YOUNG; and the said Master, Fellows, &c. (By Information and Bill),

*Against*

JOSEPH MUNBY, Defendant.

ROLLS.
*Nov.* 14, 1815.
*Mar.* 18, 1816.

Grant, by indenture executed more than twelve months before the grantor's death, and duly enrolled, of a house and premises held under a church-lease, to *T. C. Cambridge*, in trust for the rector of *G.* valid, under the statute of mortmain, and not affected by the circumstance of the grantor being himself rector of *G.* at the time of the grant, and retaining the deed in his own possession.

Assignment of mortgage-premises, and of the principal sum due thereon, to the same college, upon the like trust, void, as being executed within a twelvemonth before the death of the donor, not to be set up by reference to a will made afterwards, giving the advowson of the living beneficially to the college.

Bequest of money to be laid out in building upon land already in mortmain, good.

Recital in a will of property given by deed, which fails, not by any defect in the instrument itself, but by the grantor not having lived to the period prescribed by the statute for rendering the deed effectual, does not operate as a confirmation, or by way of relation, so as to pass the property thereby assigned.

Grant of land to a college, not beneficially, but in trust for other objects, not within the exception of the statute in favour of the Universities, &c.

THE Reverend *John Pigott*, rector of *Gilling East*, by indenture, dated the 15th of *July*, 1811, made between him the said *John Pigott*, of the first part; *Carter*, (a trustee for him of the premises thereby conveyed,) of the second part; and the Master, Fellows, and Scholars of *Trinity College*, *Cambridge*,

1816.

ATTORNEY GENERAL v. MUNBY.

of the third part; after reciting (among other things) that he was desirous of augmenting the revenues of *Trinity College*, and of rendering the succession to the fellowships therein more quick, assigned a certain leasehold messuage or dwelling-house, situate in the *Close* of the cathedral of *York*, (to which he was then entitled for a term of years, with benefit of renewal,) to the said Master, Fellows, and Scholars, and their successors, "in trust, to permit the rector for the time being of the said rectory of *Gilling East*, to hold, use, and occupy the same, during his incumbency, or otherwise to receive and take the issues and profits thereof, to and for his own use and benefit," paying the reserved rent and fines for renewal, &c. And he thereby bargained, sold, and transferred to the said Master, &c. all and singular the household goods, furniture, plate, and all other moveable effects (money excepted) in and about his dwelling-house at *Oswaldkirk*, and in the Minster-yard at *York*, "in trust for the sole use and benefit of the rector for the time being of *Gilling East* aforesaid."

Afterwards, by another indenture, dated the 4th of *October*, 1811, made between him the said *John Pigott*, of the one part, and the said Master, Fellows, and Scholars, of the other part, he the said *John Pigott* assigned to the said Master, Fellows, and Scholars, certain premises held by him under three several indentures of mortgage, subject to redemption by *Charles Gregory Fairfax*, and the several sums of money (making together £3000,) thereby secured, together with a bond for re-payment of the same, in trust, to receive the interest when due, and pay the same to the rector for the time being of *Gilling East* aforesaid, for his own use and benefit, and to receive the said principal sums when the same should become due and payable, and

again to invest the same, or else to suffer the same to remain so invested as aforesaid, "in order that the interest of the same might for ever thereafter be paid to, and received by, the rector for the time being of *Gilling East* aforesaid, to and for his own use and benefit."

Both indentures were, after their respective execution, duly enrolled in the Court of Chancery.

The said *John Pigott* afterwards made his will, dated the 9th of *May*, 1812, whereby he gave to the said Master, Fellows, and Scholars, the perpetual advowson of the said rectory of *Gilling East*, under a restriction, that the same should not be held by any college preacher, but that in all cases the Fellow presented to it should vacate his fellowship; desiring that he might take his degree of Doctor of Divinity the commencement following, or as soon after as might be, and that every successor might do the same, as he, the testator, had been at great expence towards making it a complete residence for them, and had, by deeds of gift, (as would be therein seen) given his interest in the lease of his said dwelling-house, &c. to be received by them for the benefit of each other, and all his furniture and moveable effects, both at the *York* house and *Oswaldkirk*, so that *Gilling* rectory-house would be completely furnished, and ready for every successor at little or no expence; and had further given, by deed of gift, to the said society, in trust, £6000, as a further endowment, therefore requiring them to see that the interest arising therefrom might be immediately employed by his successor and successors, according to the deed of gift, in building two rooms on the south side of the said rectory-house of the dimensions therein mentioned; the two rooms below to be completed according to the direc-

1816.

ATTORNEY GENERAL *v.* MUNBY.

tions thereby given; with a *nota bene*, that when the above rooms were finished, the interest arising from the £6000 was to be paid to the incumbent for the time being, half yearly. The testator then enjoined his executor to look upon it as part of his trust, and, as he would be nearer the spot, to communicate with the college, and give his assistance to see that the above rooms be finished accordingly; directing the builders employed to obey the directions of his said executor;" and took notice by another *nota bene*, that as Mr. *Hailstone*, (who was himself a fellow of the college,) had had the trouble of negociating the above business with him in behalf of the college, he wished him to have his option (before any other member) of the next avoidance. The testator then gave to his immediate successors at *Gilling* and *Oswaldkirk* £100 each, "in trust to pay the interest to the respective parish clerks whom they should nominate;" and, after giving some other legacies, appointed his "faithful friend, *Joseph Munby*, attorney at law, in *York*," (the defendant) his sole executor, giving him £3000 for his trouble, together with what residue there might be after discharging his said annuities; and concluded with the following words:—"N. B. at present, I have only transferred £3000, part of the above-mentioned £6000, for the benefit of the rector of *Gilling*. Now, if I should die before I transfer the remaining £3000, I do, in such event, give the Master, Fellows, and Scholars of *Trinity College*, the sum of £3000 sterling, upon the same trusts and for the same purposes as I have already given and assigned to them the sum of £3000 due to me from *Charles Gregory Fairfax*, Esq."

The Testator died on the 19th of *August*, 1812, without having transferred the remaining £3000; and his will was proved by the defendant *Joseph Munby*, his

executor, who took possession of his personal estate, and, among other things, of the said leasehold premises, household goods, and furniture, and of the title-deeds relating to both the Testator's houses, and the said indentures of mortgage.

The Information and Bill stating these facts, went on to state—That by the Testator's death, the rectory of *Gilling* became vacant, and thereupon the relators, the said Master, Fellows, and Scholars, became desirous of presenting the Rev. *John Hailstone*, one of the fellows, to the said rectory; but that, in consequence of an intimation from the Defendant of his intention to dispute the validity of the said deeds and instruments, or some of them, no member of the college was presented, but the right of collating became vested, by lapse, in the archbishop, who accordingly collated the Plaintiff *Thomas Young*, another fellow of the college, to the said rectory, with the consent of the said relators.

The Information and Bill then charged that the Testator, in his life-time, frequently expressed his intention to the Defendant and others, and consulted and advised with him, the Defendant, respecting the most effectual way of granting and assuring the said leasehold premises, goods, monies, and effects, and that the Defendant was the attorney employed by the Testator in all his affairs, and particularly in the aforesaid transactions, and who actually advised and prepared the deeds of July and October, 1811, and the will, to which he was also one of the attesting witnesses:

That the Master, Fellows, and Scholars of *Trinity College* have, by their charter and the statutes of their foundation, a licence to take in mortmain to a certain

1816.

ATTORNEY-GENERAL *v.* MUNBY.

extent, and had also obtained his Majesty's special licence to take in mortmain the premises comprised in the said indentures and will respectively:

Therefore praying that the two deeds might be declared valid, and the legacies of £3000 and £100, to have passed by the Testator's will; and that the Defendant might be decreed to deliver up to the relators, the Master, Fellows, and Scholars aforesaid, in trust for the Plaintiff *Young*, and his successors, or to the said Plaintiff, the possession of the said leasehold premises, together with the title-deeds relating thereto, and the said household goods and furniture, &c. and the three several indentures of mortgage, together with *Fairfax*'s bond, to account for the rents and profits of the said leasehold premises, and interest upon the said mortgages, and to pay the said legacies of £3000 and £100, to them the said relators; and for an inventory of, and injunction from selling and disposing of, the said household goods and furniture.

The Defendant, by his answer, admitted the deed of *July* 15, 1811, and its enrolment; but stated that the Testator kept the said deed in his possession until the time of his death, and gave some part of the furniture mentioned therein to his servants, after he had executed the same. He also admitted the second deed and the will; that he was the attorney employed by the Testator on most occasions, and prepared both the deeds by the Testator's directions, but not the will, which was prepared wholly by the Testator himself; but he denied that he advised the Testator to make such disposition of his property by the said deeds; and said that, on the contrary, he endeavoured to convince him that such disposition was illegal; insisting that the deed of *July* 15, 1811, was void altogether, both as it

1816.

ATTORNEY-GENERAL *v.* MUNBY.

respected the dwelling-house and premises therein mentioned, and also the household goods, furniture, and other effects therein mentioned to be enjoyed with the same, and that the other deed was also void; submitting, as to the devise of the advowson of *Gilling*, whether the same was a legal and valid devise.

The Answer further stated, that the Testator considerably reduced his personal estate by giving £12,000 to the college in his life-time, and within twelve months preceding his decease; and that, as the Defendant believed, the Testator did not, according to the rule of the Court for apportioning the funds in cases of this sort, leave sufficient assets for the full payment of the legacies of £3000 and £100.

The Relators and Plaintiffs replied, but no witnesses were examined on either side, and the cause came on this day on the facts of the case as admitted by the Answer.

Sir *S. Romilly*, *Ainslie*, *Bell*, and *Heys*, for the Attorney-General, and the Relators and Plaintiffs.

There can be no objection to the validity of the first of these instruments, which is an assignment of property held under a church lease, executed more than twelve months before the Testator's death, and duly enrolled, to the Master and Fellows of *Trinity* college, not beneficially, but merely as trustees for the incumbent, for the time being, of this rectory, and containing no reservation of any interest to the grantor, or those claiming under him (*a*); unless the circumstance

(*a*) See Stat. 9 *Geo.* 2. c. 36. s. 1.

1816.

Attorney-General v. Munby.

of his being himself the incumbent at the time of making the grant in question should be construed as operating such a reservation within the provision of the statute. But that means a personal reservation; and cannot apply where the interest reserved is merely incidental to the grantor's situation in another capacity. Nor can any more solid objection be raised from the fact of his having retained the deed in his own possession. The interest had actually passed by the acts of sealing and delivery. If he had cancelled or destroyed the deed, it would not have effected the actual transfer. But, were it otherwise, the question could not arise upon a deed enrolled, the Act of Enrolment having put the instrument itself entirely out of the power and controul of the grantor. In *Moss* v. *Miles* (a), which was a case on the Registry Act, Mr. J. *Laurence* is represented as having said, "There is no doubt that if an estate vest in a person by deed, the cancelling of the deed, though it may create a difficulty of proving the title, yet cannot devest the estate;" and Lord *Ellenborough*, in the same case, refers to *Woodward* v. *Aston* (b), as determining that point. So *Roe* dem. *Lord Berkley* v. *The Archbishop of York* (c), and see *Leech* v. *Leech* (d).

The second deed was executed and enrolled in like manner with the preceding; but the grantor did not live to the full period of twelve months after the execution. It is, therefore, out of the protection of the statute; and, taken by itself, would be void as to the mortgaged premises. But the question is,

(a) 6 East, 144.

(b) 1 Ventr. 296.

(c) 6 East, 86.

(d) 2 Cha. Rep. 100. See also *Sluysken* v. *Hunter*. ante, p. 40.

whether it must not be taken to be so connected with the will, in which it is subsequently recited, as for the same construction to run through both, that construction being a general intention in favour of the College, the property assigned by the deed being in augmentation of the living which is given by the will to the College; and then, the proviso in the statute (*a*), *viz.* "That it shall not extend to make void the disposition of any lands, &c. to or in trust for either of the two Universities, or any of the colleges within the same," will apply so as to render it valid. The will recites the gift as complete; and a recital in a will that the testator has done what he has omitted formally to do, will operate to supply the defect of his former disposition.

Then, as to the will, the gift of the advowson is clearly within the exception of the statute, a gift to the fellows of a college being a gift to the college itself (*b*). And the legacy given to the college for the purpose of enlarging the rectory-house, is effectual; it having been decided in many cases (*c*), that such a bequest is valid to the extent of any application upon land already in Mortmain. As to the £3000 originally given by the will, there cannot therefore exist the smallest doubt, any more than with regard to the legacies of £100 to the Testator's successors in the livings of *Gilling* and *Oswaldkirk*, those legacies being merely pecuniary.

(*a*) Sect. 4.

(*b*) *Attorney-General* v. *Tancred*, Amb. 351. Bridgman's Duke's Char. Uses, 403.

(*c*) *Glubb* v. *Attorney-General*, Amb. 373.; and *Attorney-General* v. *Parsons*, 8 Ves. 186, where the cases on this subject are collected.

1816.

ATTORNEY-GENERAL *v.* MUNDY.

*Hart*, *Leach*, and *Heald*, for the Defendant.

The Court can pay no attention to the views which actuated the Grantor, nor to the question whether his object was, or was not, a meritorious object. The single question is, Whether the dispositions he has made are according to law; in other words, whether the institutions which he had in his contemplation can be supported.

The objection to the first deed is, that it is not executed in compliance with the requisites of the Act. Has the Grantor made his gift to take effect in possession, "without any reservation, trust, condition, or limitation whatever, for the benefit of the donor, or of any person or persons claiming under him?" If he has not done this, the gift is absolutely void; and, in order to establish it, it is incumbent on those claiming under it, to shew that he has actually, and *bonâ fide*, done that which the legislature has laid down as essential to the validity of such a gift. But then it is attempted to cure this defect, by saying that the gift is in favour of a college, and therefore within the exception of the fourth section; and upon this the question arises, To whose benefit is the property actually given? If the college are the beneficial devisees, we will admit that the question is at an end, because the college is within the exception; and, (having obtained the King's licence), is therefore competent to take. But this is not the case. The college are merely trustees, and the beneficial interest is limited to a particular charitable use. The gift, therefore, falls to the ground, as already stated, because the requisites of the Act have not been fulfilled. The policy of the law is, to

discourage what the statute calls improvident alienations, and, with this object, it provides that the Grantor shall absolutely divest himself of all interest whatever in the subject of his donation. The Grantor, in the present instance, did nothing like this; he did not deliver the deed, but kept it in his own possession. In that deed, his own description of himself is as rector of *Gilling East*, and the gift is to the college, as trustees for the rector of *Gilling East*. Can it be said, then, that, either immediately on the execution of the deed, or ever at any time in the whole course of his life, he parted with the property purporting to be transferred by it? His retaining the deed is evidence of his intention to elude the statute, this case being entirely different from those in which the mere execution of the deed having altered the possession of the property, its being retained by the Grantor, and even afterwards cancelled, has been held not to affect the transaction. Under the circumstances of this case, the Act of Enrollment, twelve months before the death of the Grantor, is nothing to the purpose. If this could be supported, there would be no use in the Statute of Mortmain, which might be evaded upon every occasion.

With regard to the gift of the furniture, being of personal property, if it stood alone it could not be impeached; but, as it now stands, it is incorporated with the former grant, and must fall to the ground together with it. It is to be enjoyed with the house: the rector of *Gilling* is to have the use of it only as resident there. Yet a gift of personal property to a corporation sole cannot pass to the successors; it vests absolutely in the first taker. In this instance the Grantor is himself the first taker, so that it is a gift

1816.

ATTORNEY-GENERAL v. MUNBY.

merely in trust for himself, and passes, at his death, to his executor.

Then, as to the second deed, it is admitted that, taken by itself, it would be void; but it is said to be established, and made available, by the will which recites and follows it. But, suppose it were the case in fact, as they contend it must be inferred to have been, that the disposition by the will was made previous to, or was inchoate at the time of, the execution of the deed, this would have made no difference in the case; for the will is an instrument, whatever its date, which can have no effect till the death of the Testator. Consequently, the object for which, according to this supposition, the property on mortgage was to be applied did not exist. It falls to the ground altogether; and, although the late cases have decided that, where a general charitable intent is manifested, although not sufficiently specified, the Court will effectuate that intent (*a*), yet, where there is a particular purpose, and that purpose fails altogether, the Court cannot substitute any other.

As to the devise of the Advowson, no Decree can be made respecting it, the heir at law not being before the Court; but, being expressly given to the College, we apprehend that this devise must be considered as valid; and, if they had been the owners of the advowson at the time of the execution of the deed, being *cestuis que trust* as well as trustees, it might have been fairly enough contended that the exception would operate in their favour so as to give them the beneficial interest in what it was attempted to pass by the deed. But this was not the case; and the accidental circum-

(*a*) See the case of *Mills v. Farmer*; ante, p. 55.

stance of their afterwards acquiring the Advowson, cannot alter their situation with respect to the operation of that previous instrument.

As matters then stood, the rector of *Gilling* had no necessary connection whatever with the Master and Fellows of *Trinity College*. Nay, the Grantor himself, who was the rector for the time being, does not appear to have had any connection with that society. The argument, if to be maintained at all, would hold equally good in case any other person, and not the Testator, had been the grantor. Suppose Mr. *Pigott* to have given the property by deed, and then died, and that the college, having no interest in the advowson at the time of his death, had taken by grant of some other person, being the patron, at a subsequent period; could this possibly have been contended to make the prior gift valid? Suppose *Trinity College* to have *purchased* the advowson for the purpose of giving effect to the deed; would that purpose have been answered by their so doing?

*Sir S. Romilly*, in reply.

The deed of *July*, 1811, was executed strictly according to the provisions of the statute. The personal chattels passed by it of course, for to them the statute does not apply. With respect to the leasehold messuage, the Act requires immediate possession and delivery.

It has been said that the College had no intimation of the grant, but that is unsupported in fact: the Answer only alleges that the deed was retained by the Grantor in his own possession. And it appears also that it was executed in concert with Mr. *Hailstone*,

1816.

ATTORNEY-GENERAL v. MUNBY.

one of the fellows of the college; but whether it was or not does not signify, for the enrolment, which was made within six months after the execution of the deed, according to the express direction of the Statute, afforded sufficient notoriety; and there could be no actual delivery of possession, owing to the Grantor being himself the rector for the time being.

Neither does this circumstance, of the Grantor being rector, at all affect the validity of the grant, as causing a reservation of interest within the meaning of the Statute. Is there any thing in that Statute to prohibit a rector from endowing his own rectory? The meaning of the Act is only that the deed shall *bonâ fide* take effect immediately; and the present deed does so take effect. From the moment of its execution he retains possession, not by virtue of his former title, but as rector of the parish of *Gilling*, under his own grant. As such rector, he has no power to revoke that grant; and the enrolment, by rendering it a public act, has effectually placed it out of his reach in his former capacity. No doubt he is entitled to the use of the property during the period of his incumbency: but this is as incumbent; it is by virtue of the grant itself, and not by virtue of any reservation out of it.

As to the next deed, we admit that, standing alone, it cannot be supported under the Statute, because not executed till within a year before the death of the Grantor. The only view in which it can be taken to have effect, is, by considering the advowson as already given, and this provision as an augmentation. There can be no question about the validity of the gift of the advowson, under the exception in the Act in favour of the universities. Now it is evident by the will, that the Testator himself considered the gift of the advow-

son as with relation to both the deeds. He recites that he had, by deed of gift, given all his furniture, &c. at *York* house and at *Oswaldkirk*, "so that *Gilling* rectory-house would be completely furnished and ready for every successor." But there is nothing of this in the deed of *July*, 1811. So also, in the deed of *October* following, he has said nothing about the building of the two rooms at the rectory-house; but in his will he recites that deed as if he had thereby directed the interest of the £6000 to be laid out for that purpose. The £3000, which was in fact given by that deed, was on mortgage; and, therefore, if it stood alone, not to be supported because given within the period prescribed by the Statute. But, the gift being thus recognized, and its object denoted by the will, it must be taken as if actually made by the will: consequently, subsequent to the gift of the advowson, and in augmentation of it: and, even if there were any thing to prevent the money from being applied to the purpose directed, that is, to the building the two rooms on the south side of the rectory-house, yet the gift would be, nevertheless, effectual, as a residuary bequest to the college for the benefit of the rector.

*The* MASTER *of the* ROLLS.

*Mar.* 18, 1816.

The questions in this cause arise out of two deeds and a will, executed by Mr. *Pigott*, the late rector of *Gilling East*. By the first of the deeds, he has assigned certain leasehold premises, and the furniture, &c. in two houses, to the Master and Fellows of *Trinity College*, *Cambridge*, upon trust to permit the rector of *Gilling*, for the time being, to occupy the premises, and enjoy the use of the furniture, so long as he shall remain rector. By the second deed, he has assigned to the said Master and Fellows, mortgages to the amount of £3000, upon trust to permit the same

1816.

ATTORNEY-GENERAL v. MUNBY.

rector of *Gilling* to receive the interest of the money so long as it shall remain on these mortgages; and after it shall have been ca[illegible] in and invested on other securities.

By his will he gives the advowson of the rectory of *Gilling* to the said Master and Fellows absolutely; then, reciting that he had, by deed of gift, given to the said society in trust the sum of £6000, directs the interest of that sum to be applied, in the first place, in building an addition to the rectory-house, and afterwards to the use of the incumbent for the time being: and, lastly, noticing that he had as yet only transferred £3000 of that £6000, gives the remaining £3000, in case he should die before it is transferred, to the said Master and Fellows, upon the trusts of the former £3000.

The first deed was duly executed and enrolled, according to the requisitions of the statute of Mortmain, and the execution took place more than a twelvemonth before the Testator's death. The second was also executed and enrolled; but the Testator did not live to the full period of a twelvemonth after its execution.

Upon the first, the only question is, Whether the gift be affected by the circumstance that the Grantor, as being himself rector of *Gilling*, derived a benefit from his own grant; and it is said that, according to the true import and construction of the statute of Mortmain, the Grantor must part absolutely with the subject of his donation, "immediately from the making thereof," without any benefit or reservation whatever. Now, in answer to this, it is observable, that the grant itself does not contain any such reservation; that the gift does take effect immediately in possession; that there is no power of revocation, no trust, express or

implied, from which the Grantor, in his individual capacity, can derive any benefit; and, although it is said that, on the face of the deed, the Grantor is rector, and his gift is a gift for the benefit of the rector, yet it must, on the other hand, be acknowledged that this is a case for which the Statute makes no provision; which is entirely out of its contemplation; that the gift itself is absolute and irrevocable; the benefit which the Grantor enjoys under it only accidental; his enjoyment of the property no longer an enjoyment as owner, but as attached to the situation in which he happens to be placed. The moment he quits that situation, he loses all enjoyment of the property, and that may be by circumstances over which he has no manner of controul; by deprivation, or appointment to a higher benefice, perhaps at the very time when he is executing the instrument. The legislature had no intention or thought of precluding this sort of incidental advantage; and to construe the Statute otherwise would be to prohibit a rector from bestowing any endowment on his own living. Then, with regard to the furniture, and other personal chattels, it is said that the limitation is void at law; or, in other words, that the benefit cannot be taken by the successor, but must vest absolutely in the rector, and pass to his executors. But it is not recollected that this is a trust; that the entire legal interest passes to the college: there is no objection to the legal interest so passing, and I know of no objection to the college taking, subject to such a trust.

Upon the second deed, it is not disputed that the death of the Grantor within the twelvemonth must invalidate it, unless it can be set up again by the operation of the will; and, in order to support this view of its effect, it is contended that, the will having given the advow-

1816.

ATTORNEY-GENERAL v. MUNBY.

son of this rectory to *Trinity College*, the deed assigning property in augmentation of that advowson is, in fact, a deed for the benefit of the College, and therefore within the exception of the Statute. But it seems to me impossible to connect together the will and the deed, so as to make the one operate upon the other, by way of relation. They must be taken as they stand, singly; and then the deed, being a gift not beneficially to the College, but to the College in trust for another object, which is not within the exception of the Statute, it must necessarily fall to the ground, by the circumstance of the Grantor not having lived to the completion of the period assigned by the Statute for giving full effect to such a donation.

Then, as to the Will, it is contended that the whole £6000 is given; *viz*. the £3000 on mortgage, by virtue of the recital of the prior intended grant, and the other £3000 by direct disposition. It is said, the Testator has sufficiently indicated his intention that the whole £6000 should so pass; and that, being for a charitable purpose, the Court will give effect to that intention. But we must examine the will as to this, in order to see how the Testator himself understood it. He did not consider, in making this will, that he was thereby giving the sum in question: on the contrary, he apprehends that he has already given it, and that he has given it by virtue of a grant, which, by the operation of law, is essentially invalid. There is no mistake or misapprehension in this. The point does not arise upon which the Court, in other cases, have construed a recital in a will as equivalent to an express gift. He recites that he has given by a certain deed. He had so given; and the failure of the gift is not from any defect in the frame or execution of that instrument, but arises from an event wholly unconnected with it, and

over which he had no controul,—the death of the Grantor within the time prescribed by law for giving effect to it. The will, therefore, is good, as a gift of the £3000 originally bestowed by it; but it has no effect upon the former gift, which must fail for the reasons before given.

One more objection requires to be noticed, which is, not to the gift itself, but to the purpose for which it is to be applied; *viz.* the building two additional rooms to the rectory-house. But it is clear, on the authority of the cases, that such a purpose is consistent with law, no additional land being to be put into Mortmain; and it was accordingly so decided in the case of the *Attorney-General* v. *Parsons* (*a*), where, though the bequest was equivocal, because it might have signified an addition to the land as well as to the buildings already erected; yet the Court held that, so far as it applied to the latter object merely, it was effectual. Here there is no allegation that the buildings are to be erected on any land but that already devised to the College.

The following is the substance of the Minutes of Decree, as settled by the Counsel on each side:

"Declare, that the Deed or Indenture of the 15*th* of *July*, 1811, is a good and valid grant of the premises thereby granted and assigned; and that, under and by virtue thereof, the Relators and Plaintiffs are entitled to the dwelling-house, garden, and premises, lately occupied by *John Pigott*, the grantor, and also to all and singular the household goods, furniture, &c.

(*a*) 8 *Ves.* 186.

1816.

ATTORNEY-GENERAL *v.* MUNBY.

in and about the dwelling-houses and premises of him the said *John Pigott*, at *Oswaldkirk*, and in the Minster-yard at *York*: and that the said Relators and Plaintiffs are also entitled, under and by virtue of the Will of the said *John Pigott*, to a legacy or sum of £3000. And let the Information and Bill, so far as it seeks to establish the Indenture dated the 4*th* of *October* 1811, stand dismissed out of this Court, without costs."—Possession of the prebendal-house, garden, and premises, in the Minster-yard at *York*, and of all the household goods and furniture, &c. in the two houses, to be delivered up to the said Relators and Plaintiffs, together with the deeds and writings relating thereto, and to all the premises granted and assigned by the Indenture of the 15*th* of *July*, 1811.—All Title-deeds, Documents, Evidences, and Writings, relating to the Advowson of the rectory of *Gilling*, which, in pursuance of an Order, dated the 9*th* of *July*, 1814, were deposited in the Master's office, to be delivered to the Relators and Plaintiffs, the Master and Fellows of *Trinity College, Cambridge*. "And let the Defendant, out of the assets of the said Testator, pay to the said Relators and Plaintiffs, the said legacy of £3000, with interest at 4*l. per cent.* from the end of one year after the death of the said Testator."

1816.

## NORWAY *v.* ROWE.

*April* 9.

The Bill, required the Defendant to set forth an account of all and every the quantities of metals and minerals dug, &c. distinguishing from which of the mines the same were respectively raised, &c. and when, &c. and the full value thereof, and of every particular, and how he computes the same; and when, and to whom, and for what he has sold and disposed of the same, or so much thereof, as, &c.; and where, and in whose custody or power the residue thereof remaining unsold now is, and the costs and expenses of working the mines, and the clear profits made thereby, and how he computes the profits. A schedule to the Answer, setting forth a transcript of all the items in tradesmen's bills, &c. was held impertinent; and the Master having reported the whole of the schedule impertinent, without distinction of the particular items, Exceptions to that Report were over-ruled.

An Answer to a Bill for an account, setting out particulars in detail, although in some sense to be called pertinent, yet, if manifestly not called for by the nature of the case, may be held impertinent, as being vexatious and oppressive.

THIS Case, the material facts of which, previous to the General Exception taken by the Defendants to the Master's Report of Impertinence, are detailed, *ante*, p. 135, now came before the Court upon that Exception.

The main part of the Answer reported impertinent was the first schedule, comprising 3431 folios, wherein were set forth, as it appeared, all the particular items of every tradesman's bill; the Plaintiffs alleging that the Defendants were called upon to set out the total amount of each bill only.

The material passages in the Bill, calling for these accounts, were the following:—

1816.

NORWAY v. ROWE.

" That the said *Joshua Rowe* has ever since been in possession of the said several mines and premises, and has worked the same, and has employed therein the materials, and machinery, and effects so purchased of the said *John Amler Hanley*, and of the several other joint adventurers in the said mining concern; and has raised or gotten therefrom divers large quantities of tin, tin ore, copper, copper ore, lead, lead ore, and other metals and minerals, which have been sold and disposed of by him, or that a very great profit hath arisen and been made from the working of the said mines; but he, the said *Joshua Rowe*, has never accounted to Plaintiffs, or any of them, or such said joint adventurers aforesaid, for the produce of the several mines, or for the profits made thereby, since the time of the death of the said *John Amler Hanley*; but, on the contrary thereof, had refused to come to any such account.

" That, upon being informed of the aforesaid conduct of the said *Joshua Rowe*, Plaintiffs applied to, and remonstrated with him thereon, insisting on their rights and claims, in respect of the aforesaid shares in the said mines or mining concern; and that, being intitled, as before-mentioned, they have frequently, and in a friendly manner, applied to the said *Joshua Rowe*, and requested him to come to a fair and just account for and in respect of all and singular the quantities of tin, tin ore, copper, copper ore, lead, lead ore, and other metals and minerals, which, subsequent to the death of the said *John Amler Hanley*, have been dug and raised from the aforesaid mines, and which have been possessed or received, and sold and disposed of, by the said *Joshua Rowe*, or by his order, or on his account, and for the full value and produce thereof, and to pay

to Plaintiffs respectively, their fair shares and proportions of such produce, after all proper allowances and expenses."

The Bill then charged, "that the profits which, during that time, have been made by the said *Joshua Rowe* in working the said mines, have been to a very great amount; and that the expenses of working the same have been very inconsiderable, the said mine called *Great Crinnis*, which has been principally worked by him, from its situation wanting little or no machinery for the working thereof, and that the value of the ore raised from the said mine by the said *Joshua Rowe* has, upon the whole, greatly exceeded the expenses of working the same, and so it would appear if the said *Joshua Rowe* would set forth a true and just account of all and every the quantities of ore, metals, or minerals, dug or taken up from the said mines, or any of them, from the time of the decease of the said *John Amler Hanley*, or by him the said *Joshua Rowe*, or by any person or persons by his order, or for his use, or on his account, distinguishing from which of such mines the same were respectively raised and gotten, and when in particular, and the full and true value thereof, and of every part thereof, and how he computes such value, and when, and to whom, and for what, he has sold and disposed of such ore, metals, or minerals, or so much thereof as has hitherto been sold and disposed of, and where and in whose custody and power the residue thereof, remaining unsold, now is or remains; and also if he would set forth the costs and expenses of working and carrying on the business of the said mines, during the time aforesaid, and the clear profits made thereby, and how he makes out and computes such profits; but which he refuses to do."

1816.
NORWAY
v.
ROWE.

The Bill proceeded to interrogate, "Whether the said *Joshua Rowe* had not received and gotten from the said mines, or some and which of them, divers large or some and what quantities of tin, tin ore, copper, copper ore, lead, lead ore, and other metals and minerals, or some or which of the said several matters and things; and whether the same have not been sold and disposed of by him, and what is become thereof; and whether very great or some and what profits have not arisen and been made from such working of the said mines; and whether the said Defendant, *Joshua Rowe*, hath ever accounted with Plaintiff, or any or either and which of them, for the produce of such mines, or the profits made thereby, since the time he has been in the possession and management of the said mines."

Therefore requiring, "That the said Defendant, *Joshua Rowe*, may set forth a true and just account of all and every the quantities of ore, metals, or minerals, dug or taken up from the said mines, or any of them, from the time of the decease of the said *John Amler Hanley*, by him the said Defendant, or by any person or persons by his order, or for his use, or on his account, distinguishing from which of such mines the same were respectively raised and gotten, and when in particular, and the full and true value thereof, and of every particular, and how he computes such value, and when and to whom, and for what, he has sold and disposed of such ore, metals, and minerals, or so much thereof as hath hitherto been sold and disposed of as aforesaid, and where and in whose custody or power the residue thereof remaining unsold now is or remains; and that he the said Defendant, *Joshua Rowe*, may also set forth the costs and expenses of working and carrying on the business of the mines during the time aforesaid,

and the clear profits made thereby, and how he makes out and computes such profits."

1816.

NORWAY v. ROWE.

Sir S. *Romilly*, *Hart*, and *Perkins*, in support of the Exception.

In a former stage of these proceedings, when the Answer had been excepted to for insufficiency, and reported sufficient, the *Vice-Chancellor* allowed the exception to the Master's Report on the authority of the cases of *Dolder* v. *Huntingfield* (a), *Faulder* v. *Stuart* (b), and others, in which the question, how far a Defendant can by answer refuse to answer fully has been of late so much agitated. His Honor thought, that, with reference to what has fallen from the Court in these instances, he was obliged to consider the former answer of this Defendant, declining to set out the accounts, insufficient. He has since set out the accounts as demanded; and now they complain of what he has done, insisting that he ought to have set out the gross amount only, and not the particular items. On the other hand, the extreme length to which these accounts would necessarily run was stated by the Defendant as an objection to setting out the accounts at the hearing of the former exceptions; and it is not a little hard that they should now complain of that which they then persisted in demanding, notwithstanding such statement. There can be no pretence that the bill does not verbally and

(a) 11 Ves. 283.

(b) 11 Ves. 296. *Shaw* v. *Ching*, *ibid.* 303. *Rowe* v. *Teed*, 15 Ves. 372. *Drew* v. *Drew*, 2 Ves. and B. 161. *Leonard* v. *Leonard*, 1 Ball and B. 323. *Stratford* v. *Hogan*, 2 Ball and B. 164. *Agar* v. *Regent's Canal Company*, Cooper, 212, but particularly, *Somerville* v. *Mackay*, 16 Ves. 382.

1816.

NORWAY v. ROWE.

strictly require the setting out the accounts as they are now set out, and the only question must be, whether a Defendant, after its being adjudged by the Court that he shall answer fully, is, or is not, bound to state all that the Plaintiff requires him to state.

If the schedule is now struck out, the Answer will be again insufficient. If the mode of setting out the account in the schedule is objected to, the Master ought not therefore to have reported the entire schedule impertinent, but should have gone through it, and framed his Report with reference to the real scope of the objection.

*Leach*, *Bell*, *Horne*, and *Pepys*, contrà.

The rule is settled that a party refusing to give a full discovery, must do so by Plea or Demurrer, not by Answer, *Somerville* v. *Mackay* (a). The object of the Defendant, in the present case, is merely delay. The question is, whether he could *bonâ fide* believe that the information he has now thought proper to give was no more than that which the bill seeks to have; whether he could have imagined that the Plaintiff, in asking for these accounts, wished to be informed of the amount and particulars of every item in every tradesman's bill, and the name of every labourer from time to time employed in carrying on the works. The Court is not to be made the instrument of so great an oppression. It is undoubtedly extremely difficult, so to shape the enquiries made in a bill for account, as to get at all that you may want, and at the same time to guard against the Defendant loading his answer with a quan-

(a) 16 Ves. 382.

1816.

NORWAY v. ROWE.

tity of superfluous matter, if he chuses to do so, under the pretext that you have called for it. But here it cannot even be pretended that the Bill asks for such accounts as the defendant has pleased to set out by way of schedule. It demands only the costs and expenses of working and carrying on the business of the mines, and the clear profits made thereby, and how the Defendant makes out and computes such profits. Now, the term "costs and expenses" is clearly understood to mean, not all the items of an account, but the general results of such items.

Then this schedule is attempted to be justified on the ground not only that it is conformable to what the Plaintiff requires, but that it actually is not more than the Plaintiff requires, by his Bill. If, therefore, the Court is satisfied that, at the time of putting in his answer, the Defendant knew he was giving more than the Plaintiff wanted, that will be sufficient to mark the schedule as impertinent.

The case of *Alsager* v. *Johnson* (a) was different; yet a great deal of the reasoning upon it is perfectly applicable. The schedule, in that case, while it contained a great deal of unnecessary matter, omitted to convey any information upon that which was principally sought by the Bill. There also, being grossly impertinent in a part which could not be conveniently separated from the remainder, the Master stated the whole schedule to be impertinent; and the Court held that the Master was perfectly right, and ordered that the Defendant should pay the costs of the Exception.

(a) 4 Ves. 217.

1816.

NORWAY v. ROWE.

Sir *S. Romilly* in reply.

The Defendant, in this case, must at all events be acquitted from the charge of oppression. The length of the schedule is an evil which the Plaintiff has voluntarily brought on himself. The interrogatories, to which this schedule is set out by way of answer, formed part of the original bill; and it was then objected to the setting out of those accounts, as demanded by the Bill, that they would extend to a length very inconvenient. The Plaintiff would not be satisfied with this objection; and, if he now complains of that which he was told must be the consequence of his insisting on a complete disclosure, it is at least incumbent on him to let us know distinctly what it is that he seeks of us; for, if I had to prepare the Answer to this Bill, now, after all this discussion, I protest that I should not know how to do it, so as to satisfy the words of the interrogatory, differently from the manner in which it is done already. Besides, there is no foundation for the charge that the schedule is a mere transcript of the tradesmen's bills. In fact, it is a transcript of the book of expenditure kept at the mines. After what has been said of vexation and oppression, the Court will pause before it causes greater oppression on our side than any that can be complained of on theirs, if what they demand be no less than that we are to go through every book of accounts kept in the whole progress of this extensive concern, for the purpose of abstracting what appears to us to be material to the Plaintiff's demand, and which, when abstracted, may not satisfy him, but only subject us to the trouble and expense of further exceptions.

*The* LORD CHANCELLOR.

As to the question of fact, whether this schedule be a transcript of the book of expenditure, or of the bills of tradesmen, as insisted by the Plaintiff, that may in some measure be guessed at from an examination of it.

That the Defendant had previously put in an Answer which was excepted to, and found insufficient, is nothing at all to the purpose. In deciding the present question, I shall also lay aside all consideration of what was the Defendant's intention in putting in this Answer. I know the difficulty of answering properly to bills framed as is ordinary in cases of account, and must observe, that it is much to be lamented that the schedule to be affixed to answers are not always submitted to Counsel, previously to the answers being filed. With regard to the Master's having reported the whole impertinent, I conceive the reason to be, that where what is pertinent is mixed with what is considered as impertinent, in such a manner as it is obvious must be the case in an Answer of this description, it is impossible for the Master to undertake to separate the one from the other. The utmost anxiety and jealousy are requisite to see that answers do not contain useless and impertinent matter; and it is an important part of the duty of the Court to keep a watchful eye on its records in this respect. In the case of an executor called upon to account for his disbursements, it is surely not necessary that he should set out every separate item; and, although in one sense it may be said, that such an exhibition of particulars would

1816.

NORWAY v. ROWE.

be pertinent, yet it would not be the less nugatory and oppressive.

---

*April* 10.

*The Lord* CHANCELLOR.

I have examined the schedule, and conversed with the Master on the subject of his Report; and I am satisfied that the Master was right in reporting the whole impertinent, supposing him to be right in saying that any part is impertinent. The whole is so mixed together as not to be capable of being separated by him.

The difficulty which struck me most forcibly in the course of the argument was this; whether a Plaintiff who pertinaciously insists on a full disclosure can reasonably be allowed to object to the disclosure made in consequence of his so insisting; but, whatever weight might be allowed to this difficulty in ordinary cases, I cannot conceive that there is any thing to justify a Defendant in setting out all the *items* of a tradesman's bill, unless they are specifically called for as such. The Bill seeks an account of expenses, not the mere amount of them; and an answer to that Bill, stating the amount only, however much in detail, would be no compliance with the requisition. (*a*) But the Court will not permit such a schedule as this is represented to be; and, on examining the schedule, it certainly appears to be, according to the representation, a mere transcript of tradesmen's bills. If it is not this, it is something, at least, tantamount to it. I have, therefore, no hesitation in agreeing with the Master, who

(*a*) *Alsager* v. *Johnson*, 4 Ves. 217.

1816.

NORWAY
v.
ROWE.

reported the Answer impertinent, and, consequently, must over-rule the Exception (*a*).

(*a*) The following note has been communicated to the Reporter by Mr. *Simpkinson*.

Nov. 1, 1811.

## FRENCH *v.* JACKO.

The Bill in this cause was filed for an account, and contained the following interrogatory.

"Whether any, and what sum of money was due from the house of *A* to the house of *B*, and how they make out the same, &c."

The Defendant in his Answer set forth a long schedule containing an account of all dealings and transactions. This Answer the Plaintiffs referred for impertinence, and the Master reported it impertinent. The Defendant took an Exception to the Master's Report.

*The* LORD CHANCELLOR

Held the Answer clearly impertinent, and therefore over-ruled the Exception, saying that the Defendant ought merely to have answered that such a sum of money was due, and that it was due upon the balance of an account.

Costs beyond the deposit were given, upon the ground of the Exception being vexatious.

Rolls. March 28.

## SMITH and Others v. STREATFIELD and Others (a).

Bequest to Executors of 4000*l.* in trust to pay one-half of the interest to *A.* and the other half to *B.* during their lives; "and as their lives drop and expire, I direct that the principal and interest be reserved and equally divided among their children, when they shall severally attain twenty-one."

*A.* died without issue. The entire principal vests in the children of *B*, on their severally attaining twenty-one.

Inconvenient consequences, not in the contemplation of the Testator, at the time of making his will, not sufficient to authorise a variation or interpolation in the terms of a bequest; where those terms are in themselves clear and intelligible.

THIS was an application by Petition to have Money out of Court, and depended upon the construction to be put upon the following clause in the will of *Elizabeth Abney*, spinster.

"I give to the Executors of this my Will, and to their Executors and Administrators, the sum of £4000, to be laid out or placed in some of the government securities, in their names, in trust that the interest arising therefrom be received by them, and equally divided and paid every half year; one half of the interest to be paid to my cousin *Sarah Saunders*, wife of Mr. *Joseph Saunders*; the other half of the interest to be paid to my cousin *Elizabeth Smith*, wife of Dr. *Hugh Smith*, during the term of their natural lives: and, as their lives drop and expire, I direct that the principal and interest be reserved, and be equally divided among their children, when they shall severally attain the age of twenty-one years."

*Sarah Saunders* died in the year 1815, having never had any child or children; *Elizabeth Smith* survived her husband, and had three children, all of whom lived to attain twenty-one, but died in the life time of their mother; two of them intestate, unmarried, and with-

(a) *Ex relatione.*

out issue, to whom she had taken out administration; and the third having made a will, and appointed his widow executrix.

*Elizabeth Smith*, as administratix of the two former, presented her Petition, claiming to be entitled, together with the Widow and Executrix of the third, to the absolute interest in the entire legacy of £4000, which had been paid into Court, and laid out under the decree in the cause.

*Wilson*, for the Petition,

Contended that, although *Elizabeth Smith*, as the surviving legatee for life, could only claim one moiety of the interest of the fund, yet the principal must belong to her children, as there were no children of *Sarah Saunders*, the other legatee for life; and as the will appeared to give the reversion to the children of both of them indiscriminately, at their age of twenty-one; which he observed, according to the cases of *Whitbread* v. *Lord St. John* (a), *Gilbert* v. *Bowman* (b), and the authorities there cited, would vest in all the children of either family, living when the first child attained that age.

*Trower*, for the Widow and Executrix of the son.

Sir *Samuel Romilly*, for the Representatives of *Streatfield*, the surviving Executor under the will of *Elizabeth Abney*,

Submitted that Mrs. *Smith's* children could only

(a) 10 Ves. 151. (b) 11 Ves. 238.

1816.

SMITH v. STREATFIELD.

claim a moiety of the fund; for that it could not be supposed, the Testatrix could have meant that, when one of the legatees for life should die, leaving children, those children should have no benefit of the reversionary bequest, until it could be seen what children the other legatee for life might have, which must be the consequence of the construction put on the clause of the Testatrix's will by the Petitioner; and he contended that the clause ought to be read as if it had expressed that the shares of each legatee for life should, as their lives dropt, go to their respective children.

*Wilson*, in reply,

Observed that the Testatrix did not give any benefit to the children immediately upon the dropping of the life interest; for the direction was, that, upon such event, "the principal and interest be reserved, &c." But, even admitting the consequence put by Sir *Samuel Romilly*, to be one which the Testatrix probably might not have wished, such a consideration could not controul the effect of the words she had used; and with respect to the word "respectively" being supplied in the clause, he contended that the Court could not insert or supply any thing in a will unless the clause were otherwise devoid of meaning or contradictory, and cited *Lugar* v. *Harman* (a), insisting that the clause in the present case was perfectly intelligible as it stood.

*The* MASTER *of the* ROLLS

Assented to the doctrine that inconvenient con-

(a) 1 Cox. 250.

May 29, 1816.

SMITH v. STREATFIELD

ces, which a Testator might not have contemplated, could not controul a bequest where the words used were clear; but intimated that, in the present case, it might be doubted whether the word "respectively," though not expressed, was not virtually to be found in the clause: and took time to consider.

On the Petition day after Easter Term, his Honor declared his opinion that the children of *Elizabeth Smith* were entitled to the reversion of the whole fund; and therefore made an Order according to the Prayer of the Petition.

## BODDY and Others v. KENT and Others.

*March* 2—5.

Order to dismiss for want of prosecution, after an abatement, although irregular, not to be regarded as a nullity.—Consequently, that Order must be discharged before the Plaintiff can obtain an order to revive the suit. On Bill by some creditors, in respect of their several demands, but not on behalf of all the creditors; *quære*, Whether the death of one of the plaintiffs causes an Abatement.

THE Plaintiffs, who were four in number, creditors of *Peckett* and *Ralph*, claimed a Dividend of Five Shillings in the Pound on their respective debts, as payable under a composition-deed, to which they, the Plaintiffs, jointly with several other creditors, were parties. None of those other creditors were made parties to the suit; and the Bill did not pray relief on behalf of the Creditors in general, but only an account and payment to the Plaintiffs.

After the Bill was filed, but before any answer came in, *Russell*, one of the Plaintiffs, died, notwithstanding which the remaining Plaintiffs, without reviv-

1816.

BODDY
*v.*
KENT.

ing the suit, threatened the Defendants, the trustees under the deed of composition, with an attachment for want of answer. In Hilary Term, 1815, the Answer was put in; but no further steps were taken by the Plaintiffs till after Michaelmas Term, when the Defendants moved to dismiss the Bill, for want of prosecution; and the Bill was dismissed accordingly, by Order, dated the 6th of *December*, under which Order the costs were taxed. On the 20th of *February* last, the Plaintiffs, on motion before the *Vice-Chancellor*, obtained an Order to revive the suit, notwithstanding their Order to dismiss; and on this day the Defendants moved to discharge the Order to revive, for irregularity.

The question was, Whether the Suit did not entirely abate by the death of one of the Plaintiffs, and whether the Order to dismiss, while the Suit was so abated, was not consequently a mere nullity, so as to entitle the Plaintiffs to proceed as if no such Order had been obtained.

Sir *Samuel Romilly* and *Koe*, in support of the motion,

Contended that this was no Abatement, but that the death of the Plaintiff rendered the suit only defective as to that individual, leaving the others at liberty to proceed as if it had not taken place. That this was clearly so in the case of creditors suing on behalf of themselves and all other creditors; and that the circumstance of its not being so expressed in this Bill made no difference, since the decree must equally embrace all the creditors of the estate. That the Bill, praying an account, did not go on to pray that the trusts of the deed might be carried into execution.

1816.

BODDY v. KENT.

*Bell* and *Blake*, contrà.

The rule is, that if a Bill is filed by several tenants in common, and one dies, the Suit becomes abated, but if by joint tenants, the death of one does not cause an abatement (*a*). In this case the interests of the Plaintiffs were totally distinct. The Suit, therefore, abated, and then there was no suit in existence upon which the Order to dismiss could operate. It was so considered by the *Vice-Chancellor*, who granted the Order to revive, as if no Order to dismiss had been obtained; and this he did agreeably to the opinion of Lord *Thurlow* in *Sellers* v. *Dawson* (*b*), where an Order to dismiss having been obtained after the plaintiff had become bankrupt, and before any proceedings were had by his assignee, that Order was held to be a mere nullity, and a motion that it might be discharged for irregularity was therefore refused.

*The* LORD CHANCELLOR.

What did Lord *Thurlow* do in the case of *Sellers* v. *Dawson*? Did he declare the Order to be a nullity and go no further? If the Order was made, it was either good or bad. Still, there it was; and it was necessary for the Court, if it were to be set aside, to make some declaration respecting it. The report of the case stops short, informing us only that the *Lord-Chancellor* made no order. It is right to know what became of the case afterwards.

Sir *S. Romilly*, in reply.

That case has no bearing upon the present. It was

(*a*) Vide Ld. Redesdale, Tr. Ch. Pl. 56. Cooper's Tr. Ch. Pl. 64. *Fallowes* v. *Williamson*, 11 Ves. 306.

(*b*) 2 Dick. 738. 2 Anstr. 458. n.

1816.

BODDY v. KENT.

the case of a sole plaintiff; and, although it is said that Bankruptcy causes no Abatement, yet it is equally certain that it operates to put a stop to all proceedings, in like manner as if there were an abatement. What we contend is, that in this case, there was no Abatement. The object of the Suit, as respects the three remaining plaintiffs, might equally have been attained in its defective state, as while it remained entire.

*The* LORD CHANCELLOR.

This Bill is filed by four creditors, praying that each may be paid the amount of a certain dividend on his respective debt. Now it is certain that unless the representatives of the deceased plaintiff are paid the amount of the dividend claimed on his behalf, there would be an objection at the hearing for want of parties; and the first question is, whether this is an objection of such a nature as necessarily to work an Abatement.

In the case of joint tenants the death of one clearly does not cause an abatement. So, in the case of creditors suing on behalf of themselves and all other creditors; because the representatives of the deceased plaintiff may then come in under the Decree in common with the other creditors. It is also certain that where several tenants in common are plaintiffs, by the death of one the suit necessarily becomes defective, as it is essential that his representatives must be before the Court at the hearing. But whether this defect causes an abatement is still another question. If the representatives of the deceased plaintiff do not chuse to carry on the suit, they ought to be brought before the Court as Defendants by the remaining plain-

1816.

BODDY v. KENT.

tiffs. Instead of so doing, these plaintiffs call on the present Defendants to put in an answer. They might have objected to put in their answer upon the ground of the defect in the frame of the suit; but, waiving this objection, they consent to answer, and, having answered, move subsequently to dismiss the bill. It was the fault of the plaintiffs that the representatives of the deceased were not previously before the Court; and the question is, whether, as they did not chuse to bring them before the Court, but treated the suit as still in existence for the purpose of calling for the answer, the Defendants are not at liberty to say, this was no Abatement, and to proceed accordingly.

But, supposing the suit to have abated, it does not therefore follow that the order obtained was a mere nullity. This was the view taken of it by the plaintiffs in moving to revive; but this view is not warranted by the case of *Sellers* v. *Dawson*. I recollect that case very well, and always thought, the order to dismiss there had been irregularly obtained. So far the case is accurately stated. But I never could understand the result of the case, and Lord *Thurlow* himself was afterwards much puzzled by it. An Order, like a Judgment, must stand, without some judicial declaration that has the effect of discharging it.

*The* LORD CHANCELLOR

*March* 14.

Again mentioned the case of *Sellers* v. *Dawson*, repeating that he considered the view of it taken by Lord *Thurlow*, treating the order obtained as a nullity, to be wrong, and that, in the present case, whether the death of the Plaintiff had, or had not, operated

1816.

BODDY v. KENT.

an Abatement, the Order to dismiss must be taken as standing until reversed. Consequently, he said, the motion made to discharge the Order to revive must be granted.

Ordered accordingly.

## BONNER v. JOHNSTON (a).

*March* 19.
*April* 4.

On Bill by vendor for a specific performance, the Court will not, before answer, make an order for payment of the purchase-money, by the Defendant in possession, unless under special circumstances, such as unreasonable delay, committing acts of ownership in alteration of the property, &c. In this case, the Defendant being in possession, not under the agreement to purchase, but as tenant to the Plaintiff at the time of the purchase, no Order was made.

THIS was a motion, before answer, that a purchaser might be ordered to pay his purchase-money into Court, supported by an affidavit of the vendor's solicitor to the following effect:—

That the Deponent had been informed, and believed that, previous to 1812, the Plaintiff was well en-

(a) As the following case was not absolutely disposed of, the insertion in this place of the arguments of Counsel, and observations which fell from the Court, in consequence of the motion, may be judged premature. It is therefore necessary to state that the Reporter's motive in so inserting them, is to correct a misapprehension as to the effect of some former cases, which, resting on their particular circumstances, are, it appears, to be considered as precedents only to the extent of determining that the Court will, in cases which appear to demand it, depart from the ordinary rule of practice in respect of such cases. The desire to make this fully understood has also, in this instance, induced the Reporter to detail the case more minutely than, under less peculiar circumstances, he should have thought necessary or expedient.

titled to an estate in fee-tail of a moiety of a certain freehold messuage and premises, called *Pound-house Farm*, in the parish of *Purleigh*; and, according to the custom of the manor, to a moiety of a certain portion of the waste soil of the manor, lying in *Purleigh* aforesaid, allotted upon the inclosure thereof, to the proprietors of the said freehold messuage and premises.

That, in *November* 1812, the Defendant, who was then, and had been for some years, (as the Deponent was informed and believed), in possession of the premises as tenant thereof, entered into a treaty with the Deponent, as solicitor and agent of the Plaintiff, for the purchase of the Plaintiff's moiety therein; and, after some negotiation respecting the same, it was on the 19th *Dec.* 1812, agreed between them, that the Defendant should purchase the Plaintiff's said moiety, at the price of £525, and should pay interest on his purchase-money at 4*l. per cent.* from the 29th *Sept.* 1802, (from which time the Plaintiff had not, as Deponent had been informed and believed, received any rent for the premises), until the time when the purchase should be completed; but the said agreement was to be subject to confirmation thereof, by the Plaintiff, who was then, and had ever since been, resident in the United States of America.

That at the time when the said agreement was so concluded, and in order to prevent any misunderstanding respecting the terms thereof, the Deponent, in the presence of the Defendant, and with his approbation, wrote a letter to Mr. *Copland*, the Defendant's solicitor, to the following effect:—

"*December* 19, 1812, *Pound House Farm.* SIR,—Mr. *Johnston* has just been here, and I have consented

1816.
BONNER
v.
JOHNSTON.

to these terms, subject to a confirmation by my Client, who is in *America*, to sell Mr. *Johnston* the moiety of £525, with £4 *per cent.* interest, instead of £5, from the 29th of *September*, 1802, until paid. Pray, forward the draft conveyance for immediate perusal."

That the abstract of title having been sent to *Copland*, as solicitor for the Defendant, for his inspection, he, on the 3d of *January*, 1813, wrote to the deponent as solicitor for the Plaintiff, with some observations on the title, and stated that, provided a satisfactory answer was given, he would lose no time in preparing the conveyance.

That on the 24th of *February* following, the deponent sent a letter to *Copland*, containing (as he believed) full and satisfactory answers to the said observations.

That *Copland* being (as the deponent believed) satisfied with such answers, and having, on the behalf of the Defendant, approved of the title, on or about the 4th of *April*, 1813, prepared and sent to the deponent, to be approved of by him, on the behalf of the Plaintiff, a draft conveyance of the said premises, containing covenants for suffering a recovery, and for surrender of the copyhold; but that no objection, or further observation, was made on the Plaintiff's title.

That the deponent approved of such draft; and the same having been returned to *Copland*, was ingrossed by him, and the ingrossment sent on the 23d of *April*, to the deponent, with a letter to the following effect:—

"*Chelmsford*, *April* 23, 1813. *Johnston* and *Bon-*

1816.

BONNER v. JOHNSTON.

*ner.* SIR,—I return you the draft and ingrossments herein for you to do the needful with them; if Mr. *Bonner* is a married man, his wife should be a party to the deed."

That the Deponent soon afterwards sent the conveyance so ingrossed to the Plaintiff in *America*, for the purpose of being executed by him.

That the Plaintiff soon afterwards duly executed the same accordingly, and returned it to the Deponent, by whom it was received in *London*, in the month of *June*, 1815, and the recovery thereby covenanted to be suffered was duly suffered as of Easter Term.

That on the 9th of *June* 1815, the Deponent sent a letter to *Copland* to the following effect:—

" *Bonner* to *Johnston*. DEAR SIR,—These deeds, and the warrant of attorney for suffering a recovery, are now returned from *America*, and the recovery will be completed in a few days, of which we will thank you to apprise your Client, and to get an appointment to pay the purchase money"— £525 0*s*.
Interest at 4 *per cent.* from 29th *Sept.* 1802, to 29th *June*, 1815,—12 years and nine months, .. .. .. .. .. .. 267 3*s*.

£792 3*s*.

That, on the 2d of *August* following, *Copland* sent the following answer to the Deponent: " I had a letter from my Client a few days since, saying he should be ready to settle the purchase next *Michaelmas*, which I trust will not be inconvenient to your Client."

1816.

BONNER v. JOHNSTON.

That the Deponent, being desirous of accommodating the Defendant, accordingly agreed to postpone the completion of the purchase until *Michaelmas*, but after that time made various applications to him on behalf of the Plaintiff, to complete his said purchase. And that, on the 6th *Nov.* last, the Defendant sent a letter to the Deponent to the following effect:—

" *Purleigh*, *Nov.* 6, 1815. SIR,—I was in hopes, when in town, to be able to arrange finally the business between your client and myself, and regret that it was not in my power to bring it to issue before I left *London*. It is my fixed intention, however, to have it concluded in the course of the present month, which I hope will not be any inconvenience to your Client; and either take it on my own account, (provided I remain in the country,) or carry a purchaser in my hand in lieu of myself, as I do not purpose to prejudice the interest of Mr. *Bonner*: the time elapsing will be allowed for."

That the Deponent verily believed, the Plaintiff had been at all times ready and willing to perform the said agreement on his part, but the Defendant had hitherto neglected or refused to pay the said purchase-money and interest; and that, on or about the 22d *Nov.* last, Deponent received the following letter relative to the purchase from a new Solicitor employed by the Defendant:—

" SIR,—I have been attended by Captain *Johnston*, on the subject of the title of a moiety of an estate at *Purleigh*, in his occupation, which it appears is not satisfactory, although the conveyances have been prepared. It is not the desire of Captain *Johnston* that any unnecessary or improper objections should be made

to the title; but it is necessary for his own security that he should have a good and marketable title, which, in its present state, it cannot be said to be; particularly that part which has been inclosed from the waste without sufficient authority."

The Deponent further stated, that the Plaintiff had, as he believed, "made out a good title to the premises, and that, before he received the said last-mentioned letter, the Deponent was not aware, nor had been informed by the Defendant, or by any person on his behalf, that the Defendant had made any objection to the title; and the Deponent believed that the objections now alleged were invalid, and were made solely for the purpose, and with the view, of delaying payment of interest; and further, that he had been informed, and believed, the Defendant was still in possession of the premises."

The Bill was filed on the 9th of *February*; and the sum which the Plaintiff sought by this motion to have paid into Court was £792 3*s*. being the amount of the principal money and interest to the 29th of *June*, 1815, which was what the Plaintiff's solicitor demanded by his letter of the 9th of that month.

The Defendant had not obtained any order for time to put in his Answer to the Bill, and had filed no Affidavit in answer to that on the part of the Plaintiff.

*Cooke* and *Combe*, in support of the motion.

*Wetherell* and *Garratt*, contrà,

Objected that the application was premature; and

1816.

Bonner v. Johnston.

that to call for such an Order before Answer was to presume that no answer could be given to the Plaintiff's demand.

*Cooke*, in reply,

Referred to the late case of *Burroughs* v. *Oakley*(a), as an authority for making such an Order on Affidavit only, that being a case where, although the Defendant had put in his Answer, yet the material fact, that of possession having been taken under the agreement to purchase, not appearing upon the pleadings, was allowed to be supplied by affidavit. He also cited *Balmanno* v. *Lumley* (b), as analogous, that being the case of a reference as to the title before Answer.

*The Lord* Chancellor.

In that case of *Balmanno* v. *Lumley*, I should have been reported to have said, I would make the Order, provided it were admitted that there was no other question between the parties. There must have been some such admission, as that the Defendant had no objection to make to the specific performance, upon being indemnified as to the title.

*In support of the motion.*

If this motion is not granted, it must be upon the

(a) Ante, pag. 52. And see *Boothby* v. *Walker*, 1 Madd. 197. In the yet later cases of *Clarke* v. *Elliott*, and *Walford* v. *Symonds*, the Vice-Chancellor has taken a general view of the practice of ordering a purchaser in possession to pay money into Court before the title is completed.

(b) 1 Ves. & B. 224.

ground that, without some admission on the part of the Defendant, no order can be made in any case.

1816.

BONNER *v.* JOHNSTON.

*The Lord* CHANCELLOR,

After looking at the report of *Burroughs* v. *Oakley*, said he wished to see the brief in that case, and desired the present application might be renewed on a future day.

*April 4.*

The Motion was accordingly renewed on this day; and *Cooke* referred the *Lord Chancellor* to *Dixon* v. *Astley* (*a*), in addition to *Burroughs* v. *Oakley*, as a direct authority for such an Order being made, under particular circumstances, before Answer; adding that, if to be granted in any case, it was most fit to be granted in the present, where the title had been already accepted by the purchaser: and he must therefore be considered as owner, and as such ought not to be suffered to retain both the purchase-money and possession of the estate.

*For the Defendant.*

*Dixon* v. *Astley* is the only case cited in which the Order has been made before Answer, and that is no authority for the present; for there were acts of ownership committed, such as cutting timber, and the Defendant had met the Plaintiff's affidavits by an affidavit of his own, which might, for such a purpose, be considered as tantamount to his having put in an Answer. This was in all respects analogous to the common practice of an Injunction to stay waste. *Bur-*

(*a*) Ante, p. 133.

1816.

BONNER v. JOHNSTON.

*roughs* v. *Oakley* is a case resting on its own circumstances; an Affidavit being allowed for the purpose of supplying one particular fact, the Defendant having put in his Answer on all the other points of the case. With regard to the cases of reference upon title before decree (*a*), they stand on a different reason altogether; the alteration introduced into the practice of the Court in that respect being attended with a great saving of time and expense. Here, on the contrary, so far from a saving in either respect, the practice sought to be established would involve the necessity of two discussions instead of one; first, on the application being made; and afterwards again, upon the coming in of the Answer. On the other hand, what advantage does the Plaintiff gain by the anticipation of a few weeks, at all commensurate to this inconvenience? Besides, this is not the case of a purchaser taking possession by virtue of the contract, but of one already in possession as tenant to the vendor at the time of entering into the contract. Such an application, if to be justified at all, can only be justified on the ground of irremediable mischief, which would call for an Injunction under similar circumstances.

*Cooke*, in reply.

The cases referred to are not cited as applicable in point of circumstances, but upon principle; and, while I admit that the old practice is against us, I apprehend that a peculiar jurisdiction has grown up of late years, adopting this principle as a variation of the original doctrine. To make such an order upon affidavit, as in *Burroughs* v. *Oakley*, is the same thing as to make it before Answer; for no affidavit can be allowed to

(*a*) See *Lowe* v. *Manners*, ante, p. 19.

# PROMOTIONS.

During the Vacation after *Hilary Term*, Mr. SERJEANT VAUGHAN was appointed one of his Majesty's Serjeants at Law.

The following Gentlemen were appointed of Counsel to his Majesty:—

JAMES BURROUGH, Esq.
JONATHAN RAINE, Esq.
JAMES SCARLETT, Esq.
CHARLES WARREN, Esq.

In *Easter Term*, on the death of *Sir* SIMON LE BLANC, Mr. Justice ABBOTT was removed from the Court of Common Pleas into the Court of King's Bench; and JAMES BURROUGH, Esq. one of his Majesty's Counsel, was appointed one of the Justices of the Court of Common Pleas.

The following Gentlemen were called within the Bar:—

JAMES TROWER, Esq.
WILLIAM COOKE, Esq.
SAMUEL YATE BENYON, Esq.

William Agar, Esq.
John Bell, Esq.
William Harrison, Esq.
Of Counsel to his Majesty;
And Charles Wetherell, Esq.
By Patent of Precedence.

In *Trinity Term*, John Hullock, Esq. was called to the degree of Serjeant at Law.

# TABLE

OF

# CASES REPORTED.

## VOL. I. PART II.

A.



B.

1816.

BONNER v. JOHNSTON.

contradict an Answer, except in the instance of waste, and other analogous cases (a). If, therefore, it is an established rule that such an Order cannot be made before Answer, the Plaintiff, in that case, must have been sent to file his supplemental bill, or to amend by supplying the fact, which was necessary to his obtaining it. There is another case, that of *Walters* v. *Upton* (b), which is completely in point as to the circumstance of the purchaser being in possession by virtue of a prior independent contract; only with this strong addition in favour of the present, that here the purchaser, who was tenant of the estate, had paid no rent for many years previous to his contracting to purchase. So far from occasioning delay, the Order to pay the purchase-money into Court in this stage of the proceedings would, in the great majority of cases, have the effect of terminating the suit; and in the present instance it may be confidently predicted that, if the Order is made, the Court will never hear any more of the cause.

*The Lord* CHANCELLOR.

Undoubtedly, the practice of this Court is altered very much for the worse, if many motions which are now made do not produce the effect which, it is contended, this would produce if it were granted; *viz.* that of terminating the dispute. So far from apprehending it to be otherwise, I am quite satisfied in my own mind that much delay and expense have been spared by allowing that to be done upon motion which could formerly have been accomplished only by the decree; and this ought to be better known to those

(a) *Isaac* v. *Humpage*, 1 Ves. J. 427.

(b) Cooper, 92. n.

1816.

BONNER v. JOHNSTON.

who complain that the time of the Court is wasted in hearing motions.

With regard to the question now before the Court, it is admitted that the general principle is not to call on the purchaser to pay his purchase-money till after the title is completed. Nevertheless, the rule is rightly laid down when it is said to be one which will bend to circumstances. In the report of the case of *Burroughs* v. *Oakley*, which is right in the main, some circumstances (*a*) which entered into the grounds of my

(*a*) The circumstances of the case of *Burroughs* v. *Oakley*, were the following: —The Bill stated that, in and previous to 1812, the Plaintiff was seised in fee-simple of certain lands in the parish of *Offley*; and was also, by virtue of an Act for inclosing lands within the said parish, and of a deed of exchange made under the directions of that Act, seised in fee-simple of certain allotments and inclosures of common field in the same parish. That, being so seised, he put the premises up to sale by public auction, on the 12th of *June*, 1812, when the Defendant became the purchaser of lot 2. consisting of a wood, called *Stubbock's Wood*, with an allotment of arable land and inclosure of the same, for 1800*l.* and of lot 3, consisting of an allotment of arable land and two small inclosures, for 430*l.*; and thereupon, according to the conditions of sale, paid a deposit in part, and signed an agreement for payment of the remainder of the purchase-money on or before the 31st of *August*, 1812, upon having a good title, with a proviso, if any delay should arise in completing the purchase, beyond the day aforesaid, to pay interest at 5*l. per cent.* from that period. The Bill then proceeded to state that an abstract was sent to the Defendant's solicitor, who objected to it that the Plaintiff had no right to dispose of the allotments, and could

decision are omitted to be noticed, such as, that part of the purchased premises were allotments under an inclosure act, to which it was objected that no title

make no legal title thereto till an award had been duly signed by the commissioners under the Act; but that no other objection had been at any time taken, and that the award had been long since executed, and remained unappealed from.

The Defendant, by his Answer, submitted that he was not bound to have paid the residue of his purchase-money, inasmuch as divers objections existed, and had been made, to the title, which, (as the Defendant was advised), rendered the Plaintiff incompetent to make a good title to the premises, and to execute a proper conveyance thereof; among other things, that it did not appear that the award had long since been executed, no copy or extract having been furnished to the Defendant or his solicitor; that, if in point of fact it had been executed, it had never been enrolled pursuant to the statute, 41 *Geo.* 3. c. 109, and that, he had been advised, the Plaintiff was incompetent to make a proper conveyance of the allotments, until the award had been both executed and enrolled. The Answer then went on to state other objections to the title, on certain deeds of exchange, which were alleged to have been improperly executed, and concluded by stating that the Defendant had communicated all these objections to the Plaintiff, who was unable, or had neglected, to remove the same; but that he was ready to complete his purchase upon having a good title.

Two Affidavits were filed in support of the motion; one by the Plaintiff's solicitor, setting forth the correspondence which passed on occasion of the objection respecting the non-execution of the award, and further stating that the Deponent had never heard of any other objection to the title previous to the Answer being filed and that no application had ever been made, by or on

1816.
BONNER
v.
JOHNSTON.

could be made till after the execution of an award (a), and there was an agreement that interest should be paid in respect of the purchase-money from the 31st of *August*, in case any delay should arise in completing the purchase beyond the period. Under those circumstances, independently of the Affidavit, I thought it not unreasonable to infer the fact of possession having been taken. There were also in that case allegations of unconscionable delay, on the part of the Defendant, in completing the purchase, and of alterations in the property by the cutting of underwood, &c.; and on these grounds I thought it right to grant the motion.

The case of *Dixon* v. *Astley* (b) is altogether inapplicable, as there Affidavit was met by Affidavit; and

the part of the Defendant, for a copy or extract of the Award, but that the same was recited in the draft of the proposed conveyance; the other Affidavit, by the Auctioneer who sold the premises, stating that he believed the Defendant entered into possession of part of the premises in *August* or *September*, 1812; that, on the 15th *December* following, the Deponent, on the part of the Plaintiff, with another surveyor on the part of the Defendant, completed a valuation of the timber on *Stubbock's Wood*, to be paid for by the Defendant; and that the Defendant had lately, in conversation with the Deponent, admitted his being in possession of the wood, and had taken three falls of timber since he had been in possession thereof.

(a) See *Kingsley* v. *Young*, 17 Ves. 468, and 18 Ves. 207, where such an objection made by a purchaser to specific performance was overruled.

(b) Upon referring to the Register's book, the Order made in *Dixon* v. *Astley* appears to have been for a reference to the Master, to see whether a good title could be made according to

though the Defendant contended, by his affidavit, that the alterations of the property charged by the Plaintiff were slight; yet, whether slight or not, as they were made after objections taken to the title, the Affidavit, in this case, was tantamount to an Answer, as it was held by Lord *Kenyon*, in the case of an application before Answer for a Receiver.

This, therefore, was an excepted case. I do not say that there may not be other cases of exception, on circumstances entirely different from these, by no means holding it necessary that, to support such an application, the party making it must produce a case exactly parallel in all particulars. I do not yet see in the case now before me those circumstances which would induce me to extend to it the benefit of the exception; but I will read the Affidavit.

The case was not mentioned again.

the agreement; and *in case the Master did not make his report within three months*, then, that the Defendant should pay the remainder of his purchase-money into Court at the expiration of that time.

END OF VOL. I.—PART 2.

# TABLE

OF

# CASES REPORTED.

## VOL. I. PART III.

### A.



### B.



### C.



### D.

# PROMOTIONS.

On the death of GEORGE HARDINGE, Esq. in the Vacation after *Trinity Term*, WILLIAM WINGFIELD, Esq. was appointed Chief Justice of the Brecon Circuit.

JOHN VAUGHAN, Esq. one of his Majesty's Serjeants at Law, and Solicitor General to the Queen, was appointed Attorney General to her Majesty; and

ANTHONY HART, Esq. one of his Majesty's Counsel, was appointed Solicitor General to her Majesty, in the room of Serjeant VAUGHAN.

*Corrections to be made in the last Number of these Reports.*

Page 264, line 23, for *possession*, read *estate*.

—— 265, —— 3, for *legal assignment*, read *building covenant*.

—— *Ibid.* —— 24, for *for*, read *from*.

—— 268, —— 8, for *clogged*, read *unclogged*.

—— 301, —— 10, for *reverting*, read *resorting*.

—— 313, —— 20, dele "On the ground now taken for the Plaintiff."

—— 344, —— 26, 7, 8, for "*and that he has given*," &c. read, "and he has given it, though by a grant, which, by the operation of law, has become invalid."

# REPORTS

OF

# CASES

ARGUED & DETERMINED

IN THE

## HIGH COURT OF CHANCERY,

Commencing in the Sittings before

*MICHAELMAS TERM,*

56 Geo. III. 1815.

---

### HOYLE *v.* LIVESEY.

Rolls.
*March* 15.

After a cause is set down for hearing, it may be advanced at the discretion of the Court.

THE Bill was for the specific performance, of an agreement on the part of the Defendant to accept a lease from the Plaintiff for a term of years specified in the agreement.

Sir *Samuel Romilly*, for the Plaintiff,

Applied, a short time since, to the Court, to have the cause advanced in the paper of causes, on the ground that the term of years would expire before it could come on to be heard in its regular course; in which case the decree which was sought could not be made against the Defendant; and the cause was

1816.

HOYLE
v.
LIVESEY.

advanced accordingly, the Plaintiff undertaking to give due notice to the Defendant of its being so advanced.

An application was now made by *Parker*, for the Defendant, to have the cause replaced where it originally stood, as it had been advanced without previous notice to the Defendant.

But the *Master of the Rolls* said, that a defendant has no right to object to a cause being heard at any time after it has been set down for hearing; it being in the discretion of the Court to direct a cause to be advanced on sufficient allegation; and that, in the present instance, it had appeared to him that, for the sake of complete justice, the cause ought to be so advanced.

ROLLS.
*March* 12, 22.

## DALY v. OSBORNE.

Decree for a reference upon the title. The cause coming on for further directions, after a report approving the title, the defendant is entitled to have an enquiry at what time a title could have been made.

THIS was a bill by vendor for specific performance. The agreement was that the purchase should be completed on the 10th of *October*, 1805 at which time, it appeared by the pleadings, that neither Plaintiff nor Defendant were in a situation to perform the contract, the former on account of an unsatisfied judgment for £12,000, and the latter not having his purchase-money ready; and it further appeared that objections had been taken to the title on the part of the Defendant, which were unanswered at the time of the bill filed, although they had since been removed.

1816.

DALY
v.
OSBORNE.

The cause coming on to be heard on bill and answer, the usual decree was made for a reference to the Master, to inquire whether the Plaintiff could make a good title; and the Master having reported in the affirmative, the cause now came on for further directions.

*Hart*, for the Plaintiff,

Pressed for a decree of specific performance, with costs.

*Wingfield*, for the Defendant,

Insisted that he was entitled to a reference to the Master, to see at what time a good title could have been made, and that if it should appear that the Plain tiff could not make a title at the time of filing his bill, he would not be entitled to his costs, and cited *Gibson* v. *Clarke* (a).

*Hart*, in reply,

Argued that it could never have been intended by the Court, in introducing a new practice with a view to expediting a specific performance, to superinduce the necessity of two decrees in the place of one; and said that *Gibson* v. *Clarke* was the case of a reference, not after a decree, but after an interlocutory order on motion.

*The* MASTER *of the* ROLLS

Took time to look into the case cited, and after-

(a) 2 Ves. & B. 103. See *Jennings* v. *Hopton*, Madd. 211.

1816.

DALY v. OSBORNE.

wards observed, that it was an authority for a reference after a decree, as well as after an interlocutory order, it being established to be necessary that the Master's report, approving the title, should first be obtained, which might be upon an enquiry directed at the hearing of the cause.

"Declare that the Plaintiff is entitled to a specific performance of the agreement. The Master to take an account of what due for principal and interest upon the purchase-money, from the 10th of *October*, 1805, and that Defendant pay the same upon the Plaintiff's executing a proper conveyance, to be settled by the Master in case of the parties differing. And, that it be referred to the Master to inquire and state whether a good title could have been made at the filing of the bill; and if not, when it was that a good title could be made.—Question of costs reserved."

ROLLS.
*May* 6, 13.

## CARELESS *v.* CARELESS.

Legacy to the Testator's nephew *Robert*, the son of *Joseph C.* The Testator had two nephews called *Robert*; one, the son of

ROBERT CARELESS, by his Will, gave and bequeathed £500, without any interest, in trust for *John Billingsley*, provided the same should be claimed within five years from his death. But in case the same legacy should not be claimed within five years from his death, then he gave and bequeathed the same sum of £500, without interest as aforesaid, *to Robert Careless his nephew, the son of Joseph Care-*

less, and *Frank Brown*, share and share alike. Then, in case he should die without children, the Testator gave his silver-cup and cover to his eldest Brother, living at his death, so as to accompany his freehold estate. He devised to his trustees all his freehold, leasehold, and copyhold estates and monies, &c. and declared the trusts as follows:—As to all his freehold estates, in case he should die without children, from and after the decease of his wife, in trust for his eldest brother *John*, his heirs and assigns, for ever; and as to £2000, 3 *per cent.* reduced annuities, in trust, to permit his wife to receive the interest and dividends thereof, to and for her own separate use and benefit, for and during the term of her natural life; and from and after her decease, in trust, to be divided in two equal parts, one of the same parts to be held in trust for the child or children of his brother *Thomas Careless*, born and to be born, to be equally divided between them, (if more than one), as tenants in common, with benefit of survivorship as therein mentioned; and as to the other of the same two parts, in trust for the children of *Elizabeth Hemmings*, his late sister, as therein directed; and as to his copyhold messuage or dwelling-house, with the lands and appurtenances therein described, and as to his undivided moiety, or half part of the leasehold messuage therein also described, in trust for his wife for life, with remainder, in case of failure of issue, in trust for his nephew *Robert Careless*, and the heirs of his body lawfully issuing; and, as to his said copyhold messuages, for want of such issue of his said nephew *Robert*, in trust for the said *John Careless*, his brother, his heirs and assigns for ever; and as to all his undivided moiety in the said two leasehold-messuages, &c. in case the said Testator should die without issue, and the said *Robert Careless*, his nephew, should depart this life under the

1816.

CARELESS
*v.*
CARELESS.

his brother *John C.*, the other of his brother *Thomas C.*; and the Testator had no brother *Joseph*, nor was there any other *Joseph C.* This is a latent ambiguity, and may be explained by evidence.

Testator gives 500*l.* *without any interest*, in trust for *A.* provided the same should be claimed within five years after his death. But in case the same should not be claimed within five years, then he gave the same *without interest as aforesaid* to *B.* Not being claimed by *A.* within the time prescribed, this legacy is payable to *B.* with interest from the expiration of the five years.

1816.

CARELESS
v.
CARELESS.

age of twenty-one years, without any issue of his body lawfully begotten, living at his death, in trust for the said *John Careless*, his executors, administrators, and assigns, as therein mentioned; and as to all his said bond-debts, and all monies to be due and owing to him thereon, in trust as to the interest thereof, to his wife, for her life, for her separate use, &c.; and from and after her decease, in case there should be such failure of his issue as aforesaid, in trust for his nephew *Robert Careless*, "the son of *John Careless*."

The Testator had two brothers, named *John* and *Thomas*, both named in the will, and who both survived him; and they had each a son called *Robert*; but the Testator never had any brother named *Joseph*, and no other nephew named *Robert* besides his two nephews, the sons of *John* and *Thomas*.

No claim was made within the five years after the Testator's death, by *John Billingsley*, in respect of the legacy of £500; nor, although the Trustees named in the will had caused advertisements to be published, and all due enquiries to be made, were they ever able to obtain any information respecting him.

The Bill filed by *Robert Careless*, the son of *John*, stating the above facts, and charging that the other *Robert*, the son of *Thomas*, was scarcely ever seen or spoken of by the Testator; and that the Defendants knew, or believed, or had reason to believe, that the Plaintiff was the person meant by the Testator to take the moiety of the £500, in default of *Billingsley's* claiming within five years, prayed a Declaration to that effect; and that the name of *Joseph* was inserted

1816.

CARELESS v. CARELESS.

in that clause of the will by mistake, instead of the name of *John*.

The Defendant, *Robert Careless*, the son of *Thomas*, by his Answer, submitted, Whether it did not appear from the construction of the other parts of the will, that the name *Joseph* was inserted by mistake for his, the Defendant's father, *Thomas*, and not for *John*, and the Defendant himself meant by the description of the Testator's nephew, *Robert* the son of *Joseph*.

Evidence was entered into on both sides: that for the Plaintiff tending to shew that he was, for many years previous to the death of the Testator, in habits of constant and unreserved intimacy and friendship with, and treated by him as the object of his greatest regard and affection, while the Defendant lived at a distance, and was almost unknown to him, so much so, that it was doubtful if the Testator knew that his brother *Thomas* had a son of that name; while the depositions for the Defendant went no farther than to state the circumstance of his having been once introduced to the Testator, many years before, as one of his, the Testator's nephews, when the Testator shook hands with him, and a few days afterwards expressed to the Deponent his satisfaction in having met him, adding some words in commendation of his appearance and manner.

Sir *S. Romilly* and *Roupell*, for the Plaintiff,

Insisted on the admissibility of the evidence, on the ground of a latent ambiguity in the Will, and that, if admissible, its effect was to shew that the Testator had no personal knowledge of the Defendant, beyond the mere occurrence of a casual introduction to him, and

1816.

CARFLESS v. CARLESS.

that he therefore could not [illegible] to be individually an object of the Testator's bounty; while the Plaintiff, on the other hand, was always regarded by him with affection, and had, accordingly, previous benefits conferred upon him by the same Will, the Defendant not being once mentioned.

Sir *Arthur Pigott*, and *Girdlestone*, for the Defendant,

Contended, that the very circumstance of the Plaintiff having been previously mentioned in the Will by his right name and description, was in favour of the Defendant, it being fairly to be inferred that the Testator could not have intended the same person when he used a description which was, in fact, inapplicable to either. They further insisted, that the ambiguity was not latent, but on the face of the Will, which must, therefore, be construed, without resorting to any evidence to explain it.

*Bell* and *Palmer*, for the residuary Legatee

Upon the face of the Will, the Defendant appears to be the person intended, while the evidence is all in favour of the Plaintiff. Supposing the evidence to be admissible, therefore, it leaves the intention still as doubtful as it finds it. The devise is, consequently, void for uncertainty.—*Thomas* v. *Thomas* (a). No explanation of a latent ambiguity can be allowed to prevail, unless the evidence be such as to render it perfectly plain and conclusive. *Dowsett* v. *Sweet* (b), *Del Mare* v. *Robello* (c).

(a) 6 Durnf. and East. 671.

(b) Amb. 175.

(c) 3 Bro. 446. 1 Ves. J. 412. And see *Andrews* v. *Dobson*, 1 Cox, 425.

1816.

CARLESS v. CARLESS.

Sir *S. Romilly*, in reply.

The Defendant is totally out of the question. The only possible doubt is, Whether it is sufficiently clear that the Testator intended the Plaintiff by this description, or whether the Devise is void for uncertainty? The Testator has, in other parts of his Will, given different interests in his property to his nephew *Robert*; and it is not supposed that, where he has so given, he intended any body but the Plaintiff by that description.

*The* MASTER *of the* ROLLS.

Why did not the Defendant claim the property given to the Testator's nephew *Robert*, generally, as well as that which is the object of this suit? The case admits of some doubt, but it lies entirely between the Plaintiff and the residuary Legatee.

*The* MASTER *of the* ROLLS.

*May* 13.

In the cases which have been cited, the name belonged to one, and the superadded description to the other, of the claimants. In the present case, the name belongs to both; and the superadded description is equally inapplicable to either. That there were two nephews of this Testator, both named *Robert*, and neither the son of *Joseph*, are facts *dehors* the Will, therefore constituting a latent ambiguity. The evidence, which must, consequently, be admitted to explain the Will, shews that the Testator was intimately acquainted with the one, and little known to the other; so little, indeed, that it does not appear he knew him by name. The presumption, therefore, is, that the Testator intended that nephew whom he knew best,

1816.

CARELESS v. CARELESS.

and with whose name it is certain that he was acquainted. Supposing, however, that this inaccurate description should be taken, therefore, to apply to the Plaintiff, the Testator has not always applied to him the same description, but has sometimes called him his nephew *Robert*, generally; and sometimes, rightly, *Robert*, the son of his brother *John*; and thence it is argued, that, as it is plain he knew the Plaintiff by his right description, so it cannot be imagined that he inserted a wrong description, intending it should apply to him. But it must be observed, that the claim of the Plaintiff to the property given by the general description of the Testator's nephew, *Robert*, is not disputed, although it is, in words, equally ambiguous with this which is disputed. This amounts to an admission, on the part of the Defendant, to the full extent of what the Plaintiff would establish by his evidence. Then, it is not pretended that the Testator could have meant any body but one of his two brothers, *John* and *Thomas*, by the description of *Joseph Careless*; nor can it be supposed that he was, in fact, ignorant of the names of his brothers. It was, therefore, a mere slip of the pen, and then, what name did he intend to write? Not *Thomas*; for then it must have been brought immediately to his mind that he had two nephews of the name of *Robert*, to one of whom he had already given as the son of *John*; and the necessity of distinguishing between them would, in that case, have induced him to describe the other accurately. If he had only one of his nephews in his mind during the whole time that he was making his Will, it is natural to conceive that such a mistake might have been made by mere inattention; but, as actual ignorance is out of the question, such a mistake would not be reconcileable with the supposition that the Testator at all thought of his *other* nephew *Robert*, so as to bring into his mind the necessity

1816.

CARLESS v. CARLESS.

of marking *which of the* two he intended. During the time that he was making his Will, therefore, he forgot, (if indeed he ever knew), that he had any nephew called *Robert* besides the Plaintiff.

Another point was raised in the cause, as to the payment of interest upon the legacy of £500, given over in case the same should not be claimed by *Billingsley* within five years from the death of the Testator; and it was contended by the residuary Legatee that no interest whatever was payable in respect of that legacy. But his Honor held that the words "without interest as aforesaid," were only intended so as to give no retrospective interest for the period of the five years, which were given for *Billingsley* to make his claim to the legacy, and that interest was payable from the expiration of those five years, when the legacy became due.

*March* 30.
*April* 2.
*May* 16.

## PARKHURST v. LOWTEN.

*B.* a purchaser, under a decree, of the first presentation to a living of which *A.* is seised for life of the advowson, afterwards takes a conveyance from *A.* of the second presentation to the same living, and sells the first presentation to the present incumbent.

To a bill by *A* to set aside this transaction on the ground of fraud, praying a discovery, *B.* puts in an answer, refusing to make the discovery required, as tending to subject him to forfeiture on account of simony.

*B.* having afterwards died, the suit is revived against his executor, who is held entitled to the same protection that was claimed by *B.*

WILLIAM *Barker Daniel*, the Plaintiff in the original suit, being seised for life of the advowson of *South* and *West Haningfield*, in *Essex*,

1816.

PARKHURST
*v.*
LOWTEN.

mortgaged the same to *Sanderson, Bloxam, and Co.* bankers, for securing to them the repayment of their advances, and executed a deed-poll, authorising them to sell the advowson, in case of non-payment. The mortgagees, afterwards, being unable to sell the advowson, filed a bill, and obtained, by consent, a decree for the sale of the next presentation, which was twice put up to sale accordingly, and bought in for the Plaintiff, *Daniel*.

At last, on the 25th of *February*, 1796, the presentation was a third time put up to sale under the decree, when *Lowten*, who had acted as the Plaintiff *Daniel's* solicitor in the conduct of the cause, and was, as the bill alleged, generally employed by him as his attorney in all his other transactions, became the purchaser for £4,100. In *June* following, *Lowten* paid off the mortgage money, and had a conveyance made to a trustee for himself, of the said presentation; and, in the course of the next month the plaintiff executed to *Lowten* a conveyance of the *second* presentation to the same living.

The Bill proceeded to state that, in *July* 1799, *Lowten* sold the first presentation for £8000, of which £2000 was paid to him at the time of sale, and the remaining £6000 secured by bond, payable, one half, on the induction, and the other half within six months after the induction of the purchaser to the said living; that on the 25th of *December*, 1800, the then incumbent died, and that thereupon the purchaser was inducted, and paid his purchase-money according to the tenor of the bond: and then charging that the purchase made by *Lowten* was as agent for, and on account of, the Plaintiff, that the conveyance afterwards executed to him of the said presentation, and also that

1816.

PARKHURST v. LOWTEN.

of the second presentation to the same living, were intended only as securities for money in which the Plaintiff was then indebted to him; and that the subsequent sale was at a considerable undervalue, and known to be so by the defendant; insisted that he ought to be considered as having purchased only for the plaintiff's benefit; or, if otherwise, that the purchase should be held to be void, having been made contrary to his professional duty as the Plaintiff's solicitor; and therefore prayed a declaration accordingly, and that it might be referred to the Master to ascertain the value of the presentation at the time of the sale thereof to the present incumbent, and the Defendant be decreed to pay to the Plaintiff the amount thereof, after deducting what was due to him on account, together with the £4,400, paid by him as the purchase-money for the said presentation.

*Lowten*, by his answer, denied agency, and alleged that the conveyance made to him of the said presentation was an absolute conveyance; then, admitting that he had sold the presentation for £6000, he insisted, by way of demurrer, that, as to so much of the bill as sought any discovery as to any alleged sale of the said presentation, or when or to whom the same was sold, or any matter or thing relative thereto (except as to the sum for which the same was sold as aforesaid) he was not bound to answer; forasmuch as the bill sought to charge him with a simoniacal contract, in respect whereof (if any were made) he, the Defendant, might be subject to divers pains and penalties (*a*).

The Defendant *Lowten* died after putting in this

(*a*) See stat. 31 Eliz. c. 6.

1816.

PARKHURST v. LOWTEN.

Answer, and a bill of Revivor and Supplement was afterwards filed by the Assignees of *Daniel*, (who had taken the benefit of the Insolvent Act), against *Lowten's* Executor, charging him with knowledge and information of the circumstances attending the transactions in the Bill mentioned, and requiring from him a discovery, together with a production of all books and papers in his possession or power, in any manner relating thereto. To this Bill an Answer was put in by the Executor, in which, after stating all the circumstances within his own knowledge, or of which he had been informed, relative to the transactions inquired into, he said that he had found, among the papers of the deceased, several letters, and drafts of letters, and an agreement in writing, which, he believed, were the whole of the papers in his possession relative to the sale of the first presentation, and which he stated that he was ready to produce as the Court might direct; and then, in Answer to the general Interrogatory in the Bill, he admitted that he had divers books and papers of the deceased in his possession, relating to the said matters, of which he set forth a schedule, and submitted to produce the same, saving all just exceptions, as the Court should direct.

Upon the coming in of this Answer, the Plaintiffs applied before the *Vice-Chancellor* for an inspection of all the Papers, &c. in the custody of the Defendant and Executor, when the Defendant objected to the production of certain of those papers, relating to the sale of the Presentation, upon the ground that they contained evidence of a simoniacal contract; and, upon his Affidavit, which was filed in consequence of an intimation from the *Vice-Chancellor*, that in none of the Papers so objected to be produced, it appeared,

1816.

PARKHURST v. LOWTEN.

either directly or indirectly, that the Presentation was sold for more than £6000, but that it appeared to have been sold for that sum only, his Honor refused the Motion as to the Papers specified, granting it as to the rest of the Papers admitted to be in the Defendant's custody.

The Plaintiffs did not think proper to draw up the Order containing this exception; but, on the 26th of *June*, 1815, renewed the application before the *Lord Chancellor*, who, on the 15th of *December* following, made the following Order :-

*June* 26. *December* 15.

" That the defendant *Thomas Lowten* do, on or before the 20th of *March* next, produce upon oath, and leave in the hands of his clerk in Court, all Deeds, Books, Papers, and Writings, mentioned in the Schedules to the Answers of the defendant *Thomas Lowten*, deceased, and of him the present defendant *Thomas Lowten*, but with liberty to the said Defendant to make such exceptions in his Affidavit, and in such terms as he may be advised to make, in order to avail himself of such reservation as to all just exceptions as is mentioned in his Answer, with liberty for the Plaintiffs, their Clerk in Court, Agent, or Solicitor, to inspect such Deeds, Books, Papers, and Writings, and take Copies or Extracts thereof, as they shall be advised at their own expense; and, after such production, the Plaintiffs are to be at liberty to make such application to the Court respecting the same, if they shall be advised that the same is insufficient, as they may be advised to make."

In pursuance of this Order, the Defendant left with his clerk in Court certain papers, &c. accompanied by an affidavit, stating that they were all the deeds,

1816.

PARKHURST v. LOWTEN.

books, papers, and writings, mentioned in the schedules to his answer, and that of the deceased Defendant, except as thereinafter mentioned; and the affidavit then went on to state, that the several papers comprised in the schedule thereto, being part of the papers, &c. mentioned in the aforesaid schedules, related to the sale of the Presentation in the pleadings mentioned, as to which the late Defendant, by his answer, submitted that he ought not to be called upon to answer, forasmuch as the bill sought to charge him with a simoniacal contract; that, in case the alleged sale were to be declared to have been simoniacal, the said presentation would lapse, and the Deponent, who was then entitled to the next Presentation, as in the pleadings mentioned, might thereby be subjected to a forfeiture, or to a loss in the nature of forfeiture; therefore submitting that he ought to be protected from producing the said papers, &c. inasmuch as the discovery would lead to, and might be used by the Plaintiffs in and towards, the proof of such simoniacal contract; and also, inasmuch as the Plaintiffs had no right to insist on such discovery: and that, as the Court would not have compelled the late Defendant to make such production or discovery as aforesaid, he, the Deponent, as Executor and Devisee of the said late Defendant, was in all respects entitled to the same protection."

This affidavit was filed on the 20th of *March*, 1816, and the Plaintiffs now moved that the Defendant might, within a week, leave with his clerk in Court the several deeds, books, papers, documents, and writings, mentioned in the schedule to his answer, which were set forth in the schedule to his said affidavit, with liberty to the Plaintiffs, their Clerk in Court, Agent, or Solicitor, to inspect and take Copies.

Sir *Samuel Romilly*, *Bell*, and *Sidebottom*, in support of the motion.

The protection claimed in this instance is in the nature of a mere personal protection of the Defendant from the forfeiture to which his discovery would render him liable, and cannot extend to his representatives. The executor can sustain no injury in such a case as the present, unless it be the possible injury of the Crown presenting a younger life to the vacant benefice, to the prejudice of the next presentation. But this is, at the most, a remote and consequential injury. That to which the rule only applies is direct and immediate. But could the late defendant have claimed this protection? He was a mere trustee for *Daniel*; and, as such, the rule would not have applied to him. As a trustee, he must be taken, negatively at least, to have contracted to do nothing that might prevent the trust from being carried into execution.' But his refusal to answer was in itself a breach of trust. At most, he was only in the situation of an over-paid mortgagee; and neither he, nor his personal representative, could have the slightest shadow of interest to oppose to the demands of the present Plaintiff.

In this view of the case, it is not necessary to consider whether the transaction was, or was not, in itself, of such a nature as amounts to a simoniacal contract.

Sir *Arthur Piggott*, *Wetherell*, and *Spence*, for the Defendant, the executor.

If the right to a discovery in this Court were unlimited, the application must succeed. But there is no rule of equity by virtue of which it can be pre-

1816.

Parkhurst v. Lowten.

tended that any such right exists; and parties who are unable to shew that they are entitled to a discovery *aliunde* will obtain no assistance here. In the present case, in order to establish his right to a discovery from this defendant, the Plaintiff must shew that the agreement of which he seeks the discovery was not simoniacal. But the whole transaction, as charged by the bill and not denied by the answer, evidently amounts to simony. There can be no question, therefore, as to the right of the Defendant to the original bill to protect himself from this dicovery; and, whatever right he possessed, the same must extend to his representative, since this is not an original suit against that representative, but the former suit revived, as to which he must stand precisely in the situation of the deceased. But, were it otherwise, there can be no pretence for saying that the avoidance of this presentation would not be an injury sufficient to constitute a forfeiture of interest, within the meaning of the rule which allows a Defendant to protect himself from discovery upon the ground of forfeiture. It is not for the other party to say, if the presentation were avoided, you might be but where you were before, or even by possibility in a better situation than you are already; it is no less a forfeiture of that which you actually have. It is an alteration of tenure, affecting the possessor just as much as a change of lives on an estate held *pur autre vie*, or the substitution of a new tenant for life to the prejudice of the immediate remainder-man.

The papers of the deceased are an absolute property in the hands of his executor, as in the case of *Lord Chesterfield's* letters; besides which, the executor has a duty to perform in protecting the character of his

1816.

PARKHURST v. LOWTEN.

testator, which constitutes a species of right, of which the common law has taken cognizance in giving an indictment for a libel on the dead (a).

Sir *Samuel Romilly*, in reply,

There is no such rule as that a party may protect himself from making a discovery on the ground that the disclosure sought would affect his character. Civil rights are not to be defeated by withholding papers, the production of which is necessary to their establishment, on so frivolous a pretext. The production cannot be refused, unless upon shewing that the party who resists is liable to sustain some penalty or forfeiture in the nature of a penalty, as the consequence of producing them.

The single question, therefore, is, whether the present defendant would in his own person, be rendered subject to a penalty by the production of these papers. If the contract did not amount to simony within the statute, it is clear there could be no forfeiture. If it did amount to simony, still how can the avoidance be considered in the light of a forfeiture with respect to this defendant? A pecuniary loss is not to be confounded with a penalty; and a mere possibility of such loss can never be sustained as a reason for refusing a discovery on the ground of its subjecting to a penalty. Upon such a principle as this, no discovery would ever be made that could, or might by possibility, be in any shape prejudicial to the Defendant called upon to make it (b).

(a) See 5 Rep. 125. The case *De Libellis famosis*.

But see also *Rex* v. *Topham*, 4 T. R. 126, where the grounds upon which such an indictment can be supported are fully explained.

(b) See *Fane* v. *Atlee*, 1 Eq. ca. ab. 77. pl. 15.

1816.

PARKHURST v. LOWTEN.

*The* LORD CHANCELLOR.

Since it appears that a considerable difficulty may arise upon the form of the objection, as taken by this answer, I must defer pronouncing my judgment till after I shall have had an opportunity of examining the pleadings. The bill alleges that the contract was simoniacal, and then it represents that *Lowten* was not a purchaser for his own benefit, but in trust to sell for the benefit of another, a clergyman, who has since taken the advantage of the Insolvent Act, and whose assignees are the present Plaintiffs. The case is one which deserves a very considerable degree of attention, for this reason, that, since it has been held that an advowson constitutes assets for the payment of debts, that decision puts the question on an entirely new ground—whether a trustee in whom the advowson is vested for the payment of debts can protect himself from discovery as to a sale in execution of his trust, upon the ground of simony in the contract. The next question is, whether, supposing that *Lowten* had protected himself by his answer from making the discovery sought, that protection can be held to extend to his representatives; and this last question will depend very much upon the form of the pleadings. Upon the question of character, I hold that, supposing a man to be liable to penalty or forfeiture provided he is sued within a limited time, and that the suit is not commenced till after the limitation expired, he is bound to answer fully, notwithstanding his answer may tend to cast a very great degree of reflection upon his character and conduct. On the other point my opinion is, that there is a very wide distinction between penalty, or forfeiture in the nature of penalty, and loss, especially loss in respect of interest only.

1816.

PARKHURST v. LOWTEN.

*May* 16.

*The Lord* CHANCELLOR,

The Bill seeks to have it declared by the Court that *Lowten* was a Trustee for the Plaintiff, as to the presentation sold by him, and to have an account accordingly rendered of the money arising from that sale; and it states a transaction, which, as it is there represented to have taken place, clearly amounts to a simoniacal transaction. When it is considered how solemnly the law has guarded against all transactions of this species, we ought not to take for granted all the facts charged in a Bill so framed. However, in his Answer, *Lowten* does not deny the simony, but, on the contrary, insists that he is not bound to make the discovery sought, upon the ground of the forfeiture attached to a simoniacal contract; and there is no doubt that, if the contract were really simoniacal, he could not be compelled to make the discovery. Then comes the question, Whether the transaction was or was not simoniacal; and, if it were such as it is represented to have been, that question must be answered in the affirmative; and so, in the absence of all proof to the contrary, it must therefore be taken to have been upon the Defendant's Answer.

However, *Lowten* died, and a bill of Revivor and Supplement was filed against his representatives; to which bill his Executor has put in an answer, stating that he is willing to produce all books and papers, &c., "saving just exceptions;" by which saving it is evident that he means to shelter himself from making any discovery which may render him liable to forfeiture. But then it is said that he, as Executor, can be liable to no forfeiture by making the discovery sought; and the answer to that is, that he is entitled to the next Presentation, which was also purchased by *Lowten*, and

1816.

PARKHURST *v.* LOWTEN.

that an avoidance by the present incumbent would consequently affect his interest in that next Presentation, since it would thereby fall to the Crown to present for this turn, and the Crown may substitute a younger and better life in the room of that by which the avoidance is made.

Thus it is shewn that the Executor has an interest in endeavouring to protect himself from the consequences of the discovery; and, with regard to the only question that remains, which is, Whether the interest is of such a nature as to afford him that ground of protection, I am, upon the whole, of opinion that he is entitled so to protect himself.

ROLLS.
*May* 31.

## WHITFIELD *v.* CLEMMENT.

Testatrix bequeaths all her personal estate to Trustees, in trust to sell, and out of the produce to pay all debts; "and in the next place to pay to *A* 300*l.* due on bond." The Testatrix owed only 120*l.* to *A.* upon bond. But the Court decreed payment of the whole 300*l.*

*DANIEL PEAKE*, by his Will, bequeathed all his personal estate to his son *Stephen*, his heirs, executors, &c. charged with certain payments thereout. *Stephen* died in the life-time of the Testator, whereby the bequest became lapsed; and, on the death of the Testator, his five infant grandchildren, the children of another son, also deceased, became entitled to his personal estate, as in the case of intestacy; notwithstanding which, *Elizabeth Peake*, the widow of *Stephen*, took possession of the same

without administration. On the eldest grandson's coming of age, a suit was instituted, which was afterwards compromised; *Elizabeth Peake*, the widow, agreeing to pay to the grand-children £300 a piece, for their shares of the property, in consideration of their releasing her from all claims in respect thereof; and such release was accordingly executed by four of the five. The fifth, (the Plaintiff in the present suit), at this time, lived with, and was maintained by, the said *Elizabeth Peake*, who, upon her coming of age, prevailed upon her to execute a similar release, in consideration of £180, alleged to have been laid out and expended by *Elizabeth Peake*, in such maintenance; and of the further sum of £120, (making together £300), which last sum of £120 was secured to her by the bond of the said *Elizabeth Peake*, and made payable within three months after the death of the obligor.

This transaction took place in 1789; and in 1808 *Elizabeth Peake* made her will, by which she gave and bequeathed to the defendants, *Clemment* and another, all her personal estate, in trust to sell, and out of the produce thereof to pay all her debts; and, in the next place, to pay to the Plaintiff "the sum of £300, due on a certain bond entered into by me to my said niece, with the interest due thereon from the time of executing the same;" and she thereby moreover bequeathed to the Plaintiff a legacy of £50, to be paid within six months after her death.

The Bill prayed an account and payment of the legacy or sum of £300, with interest from the date of the bond; and also of the £50, with interest from the end of six months after the death of the Testatrix.

1816.

WHITFIELD v. CLEMMENT.

The Defendants, on the other hand, admitting the Plaintiff to be entitled to the £50 legacy, contended that, as the Testatrix, by her will, stated the £300 to be due on the bond, whereas only £120 was in fact due thereon, the Plaintiff was, in justice and equity, entitled only to the £120, with interest from the time of the execution thereof (*a*).

*The* MASTER *of the* ROLLS

Was of opinion that, as the Testatrix had previously directed her Trustees to pay *all* her debts, the direction to them to pay this sum, merely as a debt, would have been nugatory; and that this was a strong indication of the intention that the Plaintiff should, at all events, have the sum given, as a legacy, whether it should be actually due on the bond or not. That the Testatrix was probably mistaken as to the real amount of the sum due upon the bond, but that should not operate to controul the extent of the provision designed for her niece; and if it were not meant that she should take it absolutely to that extent, it was altogether unnecessary to have mentioned the debt at all; whereas, if she intended the £300 as a certain provision, then the whole will would have its due operation. And that this was agreeable to the maxim of the civil law, *falsâ demonstratione legatum non perimi* (*b*); in

(*a*) The reporter did not hear the arguments of counsel in this case.

(*b*) Inst. lib. 2. tit. 20. s. 30. "Si quis *Titio legaverit, quod ipse debet*; si nihil debeat, inutile est legatum. Cum e contrario, si certam quantitatem adjecisset, legando *Titio centum quæ ipsi debet*, valeret legatum, etiamsi Titio nihil deberet; quia sic specificâ determinatione res relicta." Hopp. Comm. *ad locum*. Et vide, lib. 2. tit. 20. s. 14. "Si debitor creditori suo, *quod debet*, legaverit, inutile

1816.

WHITFIELD v. CLEMMENT.

conformity to which it had been held that, where a Testator has given a certain sum, as a debt due to the person to whom he gives it, the circumstance that he does not owe to that person so much as he has given, shall not invalidate the bequest (*a*).

est legatum, si *nihil plus* est in legato, quam in debito."

" *Quotiescunque* ergo," says the Commentary, " *ullâ ratione major utilitas redundat in Creditorem, toties subsistit debitum Creditori legatum.* Redundat autem major utilitas *vel ratione quantitatis,* vel qualitatis," &c.

(*a*) Vide *Williams* v. *Williams*, 2 Bro. 87. *Milner* v. *Milner*, 1 Ves. 106. Swinb. part 7. c. 5. s. 13.

## BURNETT v. ANDERSON and Others.

*June* 27.

Plaintiff having parted with the property, cannot sustain an interpleading bill against different claimants, upon an undertaking to pay over the value to the party entitled.

THE Plaintiff was a wharfinger, and by his Bill called upon the Defendants to interplead as to certain goods, which, on the 17th of *May*, had been landed at his wharf, in the name of *Law*. It was alleged that the Defendant *Anderson* claimed, as the purchaser from *Law*, in the course of business; *Law* having, on the 17th of *May*, given a valuable consideration for the goods to *Bogle*, *French*, and Co.

The Defendant *Callaghan* had sold the goods to *Bogle*, *French*, and Co. who, on the 17th of *May*, previously, (as it was alleged), to the complete delivery of the goods, had become Bankrupt; and *Callaghan* claimed as an unpaid vendor, entitled to stop *in transitu*.

1816.

Burnett v. Anderson.

The defendant *Shaw*, as the Assignee under the commission against *Bogle, French*, and Co. contended, first, as against *Callaghan*, that there had been a complete delivery on the 17th, so as to vest the property in the bankrupts and preclude a stoppage *in transitu*: and, as against *Anderson*, that, on the 17th of *May*, previously to the delivery of the goods to *Law, Bogle, French*, and Co. had notoriously committed acts of bankruptcy, and had become insolvent; and that the goods in question had been delivered to *Law*, either after, and with notice of, those circumstances; or by way of fraudulent preference, and in contemplation of bankruptcy.

*Anderson* had brought an action, and the others threatened it. The Plaintiff stated his inability to determine the validity of these oppositely stated claims, either in fact or in law.

The defendant *Anderson*, by his Answer, stated, that the Plaintiff had delivered the goods in question to the defendant *Callaghan*, under an indemnity. A motion was made upon the above circumstances, to restrain *Anderson* from proceeding in his action.

Against the motion it was contended, that the Plaintiff, having parted with the goods, could not comply with the condition upon which alone the Court interposes in cases of this nature, *viz.* the delivery, in the result, of the subject of dispute to the party entitled; and, *secondly*, that the Plaintiff having taken an indemnity from one of the parties, had provided for himself a remedy against the mischief of conflicting claims. It was at least difficult to say that, as to one of the parties, there was not collusion.

In answer to these objections, the facts were relied on, that the Defendant had undertaken, and was prepared, to pay the value of the goods into Court; that the goods were of a perishable nature; that this course was most advantageous to all the parties interested; and, lastly, that the Plaintiff's being indemnified as to one of the litigants was no reason why the Court should not procure him an indemnity as against the others, who were harassing him; the question of collusion being concluded by the Affidavit annexed to the Bill (*a*).

*Rose*, in support of the motion.

Sir *S. Romilly* and *Courtenay*, against it.

N. B.—*Callaghan*, one of the defendants, was resident in *Ireland*; as to which see *Stevenson* v. *Anderson*.

*The Lord* CHANCELLOR

Refused the motion upon the first point, declaring it to be his opinion, that the Plaintiff, having parted with the goods, stood no longer in a situation entitling him to put the claimants to an interpleader. It was not enough to say that, in the result of such a proceeding, the party entitled might have the value of his property; he was entitled to it specifically.

(*a*) Langston *v.* Boylston, 2 Ves. J. 102. Stevenson *v.* Anderson, 2 Ves. & Beames, 407.

*June* 15. *Ex parte* HUNTER and Another, in the Matter of BECHER.

Part of the Bankrupt's estate having been paid into the Bank in the names of *three* Assignees, one of whom had subsequently absconded: Order on the Bank to pay the money to the names of the two remaining Assignees.

THE Petitioners and another were Assignees of the estate and effects of the Bankrupt; and the Petition, supported by Affidavit, stated that they had, together with their co-assignee, opened an account at the bank of England, and deposited there large sums in their joint names, on account of the Bankrupt's estate; that by an Order of the Commissioners, made upon auditing the account exhibited before them by the Petitioners, they, and their Co-assignee, were directed to pay a dividend of one shilling and ninepence in the pound, on the amount of the respective debts proved under the commission; that, being desirous of complying with this Order, the Petitioners had caused enquiries to be made for their Co-assignee, to procure his signature to cheques or orders on the Bank for payment of the dividends; and that, in answer to such inquiries, they found that he had absconded from the country for the purpose of avoiding his creditors, and that a commission of bankrupt had since been awarded against him, founded on an act of bankruptcy committed by so absconding, to which he had not surrendered. The Petition went on to state, that the Petitioners had applied to the bank to pay cheques and orders signed by the Petitioners only, which had been peremptorily refused; therefore, praying that the Bank of England might be directed to pay any cheques or orders so signed, not exceeding the amount of the deposits.

Sir S. *Romilly* and *Rose*, in support of the Petition.

1816.

*Ex parte* HUNTER, in the matter of BECHER.

Sir *A. Piggott*, for the Bank, objected that payment could not safely be made, except to all the parties in whose names the funds were deposited. That it was not an application under the Statute (*a*) for transferring stock in the absence of one Trustee, but a mere cash account, as at a banker's.

However, on the authority of the case of *Ex parte Collins* (*b*), the *Lord Chancellor* made the Order, as prayed.

(*a*) 36 Geo. 3. c. 90. (*b*) 2 Cox. 427.

## BRACE *v.* ORMOND.

*July* 16.

Upon a reference to the Master, it being necessary (to enable him to make his Report,) to have the evidence of entries in the Books of the Bank of *England*, the Master is bound to grant his certificate, in order to justify the Bank in permitting an inspection, rather than compel the parties, by his refusal, to file their Bill for a Discovery.

A Motion was made, on the part of the Defendant, *Mary Ormond*, "that the Bank of *England* might be ordered to permit an inspection of the books by the solicitor of the said Defendant, for the purpose of ascertaining the time when a certain sum of £2000 was purchased in the Navy five per Cents. in the name of the Testator, *James Ormond*, and the said Defendant, his wife; and also the time when the same, or any part thereof, was sold out; or that the Bank might be ordered to furnish the said Defendant's solicitor with an extract from their books, containing the information required, it being necessary to lay such information before the Master, in order to enable

1816.

BRACE v. ORMOND.

him to make his report upon the matters referred to him in the cause."

By the decree made in this cause it was referred to the Master to take an account of the personal estate of the Testator come to the hands of the said Defendant, for taking which account the usual directions were given. In pursuance of this decree, a state of facts was laid before the Master, by which it appeared that, on the marriage of the Defendant with the Testator, and in consideration thereof, a sum of money was invested by the Testator in the purchase of the said £2000 stock, in the joint names of himself and the Defendant, £1000 (part whereof) she afterwards joined with him in selling out, on condition of its being re-invested, which had not been done. Upon attending a warrant before the Master on this state of facts, the Master required evidence to be laid before him from the books of the Bank, in order to ascertain the times of the investment and sale; in consequence of which, the Defendant's solicitor applied for an inspection of the books, or an extract therefrom; and was informed that no information could be given, unless upon production of a letter or certificate from the Master, stating that the information required was necessary to be produced before him.

The Affidavit of the Defendant's solicitor in support of the Motion went on to state that the Deponent informed the Master of the result of his application at the Bank, and requested him to give the required certificate or letter, which the Master refused to give; but inserted in the margin of the state of facts, opposite the statement relative to the investment, the following memorandum, in his own hand-writing, and with his signature :—

1816.

BRACE v. ORMOND.

"This investment must be proved; I suppose this may be done by applying at the Bank."

The Deponent then renewed his application to the Bank, exhibiting this memorandum, but was again denied the information sought, without producing a regular certificate to be deposited at the Bank; and the Master, upon this being reported to him, again refused the required certificate. The following correspondence then took place between the Deponent and the Solicitor to the Bank:—

"*June* 29, 1816.

"SIR,

"We some time since applied to you for your interference in order to obtain a search at the Bank, for the purpose of ascertaining the time when a sum of £2000 was bought into the five per Cents. in the names of Mr. and Mrs. *Ormond*, which it became necessary to ascertain, in order to support a charge carried in before the Master. The Master refused to give any certificate, but made a memorandum in the margin of the draft of the charge, stating that such an inquiry was necessary. You afterwards saw the Master upon the subject; and we understood that you had convinced him that he ought to give the usual certificate. The Master, however, still refuses to do so, and advises us to apply to the Court against the Bank; and, as the proceedings before the Master are drawing to a close, it is absolutely necessary that something should immediately be done. We should, therefore, be obliged to you to say whether you will recommend the Bank to permit us to make the search, &c.

"*To J. Kaye, Esq.*
*Solicitor to the Bank of England.*"

1816.

BRACE
*v.*
ORMOND.

"*July* 1, 1816.

"GENTLEMEN,

"In answer to your letter of the 28th of *June*, I beg leave to acquaint you, that the Bank of *England* is always ready to afford evidence from their books, in all cases where such evidence is requisite for the purposes of justice; but it is the duty of the Bank not to expose the state of property under its superintendence to indiscriminate examination. To avoid all improper disclosure of accounts kept at the Bank, the Governors and Directors require, in cases where evidence is wanted to satisfy inquiries in the Court of Chancery, that the Master, before whom the investigation takes place, should certify that the information called for is requisite for the purpose of answering the inquiries directed by the Court. I believe all the Masters in Chancery, except the Master to whom this cause stands referred, have given the requisite certificate when evidence has been called for from the Bank; and I think, upon consideration, the propriety will be seen of the Bank refusing to permit an indiscriminate inspection of their books. If the Bank were to give the information demanded on every application of a professional man, no man's account at the Bank would be secure from improper disclosure. I, therefore, conceive it to be my duty to advise the Bank not to give any information of the contents of the Bank books in cases similar to that stated in your letter, unless the Master before whom the investigation takes place will send to the Bank a certificate that the information sought for is requisite for the purpose of satisfying the inquiry he is directed by the Court to make.

"I am, Gentlemen, &c.

1816.

BRACE v. ORMOND.

An Affidavit was filed, on the part of the Bank, setting forth the above correspondence, and stating that in cases where Masters in Chancery had required evidence from the Bank books upon inquiries directed by the Court, it had been usual for them to sign a certificate, stating the particulars of the information required; and that, upon every occasion of receiving such certificate, the information required had been supplied by the Bank, and verified by Affidavit of one of the Bank clerks.

*Wingfield*, in support of the Motion.

Sir *Arthur Piggott*, for the Bank of *England*, (which, though not a party to the suit, consented to appear upon the motion, waving the point of form,)

Alleged that the Bank were perfectly willing to grant the inspection required, upon having the proper certificate; but insisted on the great public inconvenience of allowing such inspection without proper authority, and on the necessity of the Bank having, in all such cases, a document deposited with them, by which they might be enabled to shew that they had not at any time suffered an inspection to be made on light or insufficient grounds.

*The* LORD CHANCELLOR

Refused the Motion; but said, he thought it was quite proper and necessary that the Master should in such cases give his certificate, to be deposited with the Bank for their justification, there being no other alternative but the tedious and expensive resource of filing a Bill of Discovery; and that, to prevent such an in-

1816.

Brace v. Ormond.

convenience to the suitors of the Court, he would himself grant a certificate, upon a proper case laid before him.

Rolls. June 18.

## DYER v. DYER.

A Testator gives to *A.* an annuity of £20 to be paid out of his freehold estate at *W.* for his life. He gives the rents and profits of certain houses to *B.* for her life; and another house, with £10 a year for her life, to *C.*; and all the residue of his estate and effects, after the death of *A. B.* and *C.* to *D.* No estate for life in the residue passes by implication to *A. B.* and *C.*

MARK *NEWTH*, by his Will, gave and devised as follows:—"To my nephew, *James Dyer*, £20 *per annum*, to be paid out of my freehold estate at *West Port*, in the county of *Wilts*, for and during his life. Also, the house I live in, and the house that my nephew, *James Dyer*, lives in, and the house that *Sarah Grifles* lives in, and my house in *West Port*, called *Watts*, I give the rents and profits thereof to my niece, *Ann Dyer*, during her life. The house that *Elizabeth Reynolds* lives in, with the use of the brew-house, &c. I give to my servant, *Margaret Broadway* with £10 a year, to be paid to her till she dies. And, after giving to the said *Margaret Broadway* several specific articles of household furniture, he proceeded as follows:—"All the rest of my estates and chattels of what kind and nature soever, after the death of my nephew, *James Dyer*, and my niece, *Ann Dyer*, and my servant, *Margaret Broadway*, I give to *Edmund Newth's* children, and *Ann Price's* children, to be equally divided between them."

Upon the death of the Testator, his nephew, *James Dyer*, took out administration with the will annexed, and by virtue thereof possessed himself of the personal

estate, having also, as heir at law, entered into the receipt of the rents and profits of the real estate.

The Bill was filed by *Ann Dyer*, (who was an infant,) for an account of the rents and profits of the three houses specifically devised to her, and for a receiver; also claiming an interest in the residuary real and personal estate, jointly with *James Dyer* and *Margaret Broadway*, as being given to them by implication during their joint lives, and the life of the survivor, and praying that the same might be ascertained accordingly.

*Sir Samuel Romilly*, for the Plaintiff,

Referred to the case of *Hutton* v. *Simpson*, as reported in *Vernon* (a), where it is said, "*fourthly*, That a devise to *Bridget* after the death of the wife, although *Bridget* was but one of the two co-heirs, would give an estate for life to the wife by implication;" but he was interrupted by the *Master of the Rolls*, who asked, Whether the true point in that case, which follows immediately afterwards, *viz*, that there "the words in the will, *after the death of the wife*, related only to the jointure lands devised to *Bridget*," was not also the point in the present case, and, therefore, directly against the Plaintiff, it being there held, that there was no estate for life by implication? And his *Honour* afterwards read a fuller note of the same case in *Gilbert* (b), where it is said, "As to the first point, the Court seemed pretty clear that the wife took no estate for life by implication, because the implication which shall disinherit an heir at law must be necessary, and here is no necessary implication, though the daughters were

(a) 2 Vern. 722.

(b) Rep. in Eq. 115. under the name of *Simpson* v. *Hornby*.

1816.

DYER v. DYER.

heirs; because it may be intended only of those lands which were before expressly devised to the wife for life, so that they could not have them after her death, but for the others, they could have them immediately."

The claim of the Plaintiff was consequently abandoned; and it was declared that the Defendant, *James Dyer*, was entitled under the Will to an annuity of £20 for his life, charged on the Testator's freehold estates; that the Defendant, *Margaret Broadway*, was entitled to an annuity of £10 for her life, to the payment whereof the personal estate not specifically bequeathed was liable; that, under the said Will, the Plaintiff was *only* entitled to the rents and profits of the four leaseholds for her life, and the Defendant *Broadway* to the rents and profits of the leasehold bequeathed to her, also for her life; and that the Defendants, the children of *Newth* and *Price*, were entitled (subject only to such respective life estates) to the said leaseholds absolutely, to take *per capita*, and were also entitled *per capita* to the whole residue of the Testator's real and personal estate (*a*)

(*a*) Reg. Lib. A. fo. 1334.

1816

## DEFFLIS *v.* GOLDSCHMIDT.

ROLLS.
*Feb.* 14.

A Testator gives to each of his sister's children, "whether now born, or hereafter to be born, the sum of £2000 each, payable at 21," and directs his Executors to appropriate a fund for payment of those Legacies, the interest of such fund to be paid to his sister *until the Legacies become payable.* This is an intention which the Court will carry into effect in favour of children born after the death of the Testator, as well as those living at the time of his death, by directing such a fund to be impounded as will probably be sufficient to answer the purpose.

THE question in this case arose on the following disposition in the Will of *Benjamin Abraham Goldschmidt.*

"I give and bequeath to all the children of my sister, *Theobaldina Goldschmidt*, the wife of *Solomon Gotschalk Goldschmidt*, of *Hamburgh*, merchant, whether now born, or hereafter to be born, the sum of £2000 each, payable on attaining the age of twenty-one years; but if any of them, being daughters, shall marry under that age, then it is my will that their share, and the interest, and annual produce thereof, be settled for the benefit of them, their husbands, and children," in the manner therein directed.

"And in the mean time, and until the shares of the said children of my said sister, *Theobaldina Goldschmidt*, shall become payable, I direct that the interest and annual produce thereof respectively be paid to my said sister, *Theobaldina Goldschmidt*, or otherwise, that she may be authorized and impowered to receive the same for her own sole and separate use and benefit."

"And I request that my Executors, as soon as may be after my decease, do set apart and provide a sufficient fund, properly secured, for paying the said legacies to my said sister's children as they become due; and, in order that my said sister may receive the interest and

1816.

DEFFLIS v. GOLDSCHMIDT.

annual produce thereof in the mean time, as before mentioned. And, in case my said sister, *Theobaldina Goldschmidt*, shall die before all her said sons shall attain the age of twenty-one years, or before all her daughters shall attain that age, or be married, then I direct that the interest or annual produce of the legacies or sums hereinbefore provided for such sons and daughters as shall be under age or unmarried as aforesaid, or a competent part thereof, be paid or applied in or towards their education and maintenance, and that the surplus of such interest and annual produce, if any, shall be added to, and subject to the like trusts as the principal."

*Hart* and *Sidebottom*, for the Plaintiff, the Executor,

Said, that there was no more difficulty in an appropriation of this fund for the benefit of after born children, than there would be for the purpose of answering any other indefinite obligation which the Testator had, or might have, placed himself under, as surety or otherwise.

*Sir Samuel Romilly*, *Bell*, and *Collinson*, for the Defendant, the residuary legatee,

Contended that the sister's being entitled to the interest of the sum appropriated for her life, or until each legacy was payable, shewed that the Testator could not intend the fund to be an indeterminate one subject to the contingency of what children might or not be born after his decease, but that the words "hereafter to be born" should be limited to the interval between the time of making his will, and the time of his death; and referred to that class of cases in which, legacies being given to certain individuals,

1816.

DEFFLIS v. GOLDSCHMIDT.

(some of whom are not *in esse* at the time of making the bequest,) payable at a future period, those only have been held entitled, who are capable of taking at the period of distribution. *Ellison* v. *Airey* (*a*). *Andrews* v. *Partington* (*b*), *Prescott* v. *Long* (*c*), *Hoste* v. *Pratt* (*d*), and others.

*Feb.* 19.

On a subsequent day, this cause was again spoke to, and the case of *Stanley* v. *Wise*, (1 Cox 432,) cited at the Bar.

*The* MASTER *of the* ROLLS.

It is admitted, that the words of the bequest would include all the children of the Testator's sister, whether born before, or after, his death; but, from the direction to provide a sufficient fund for the payment of the legacies as soon as they respectively shall become payable, it is argued that the difficulty of ascertaining what sum is to be set aside for the purpose makes it necessary to hold that the Testator intended only those who should be born in his lifetime to take.

Inconvenience attending the carrying into effect a particular disposition by Will, not a sufficient reason for controuling its obvious construction.

The clause directing this provision to be made, however, directs it to be made for paying "the said legacies," thereby referring to the terms of the original bequest, which, as it is admitted, include all the children. Then comes the clause that the mother shall receive the interest in the mean time; which is said to create a further difficulty; but such difficulty, even if

(*a*) 1 Ves. 111.

(*b*) 3 Bro. 401.

(*c*) 2 Ves. jun. 690.

(*d*) 3 Ves. 730. See also *Whitbread* v. *Lord St. John*, 10 Ves. 152. *Gilbert* v. *Boorman*, 11 Ves. 238. *Walker* v. *Shore*, 15 Ves. 123. *Crone* v. *Odell*, 1 Ba. and Be. 449, where the doctrine on this class of cases is very fully treated.

1816.

DETTLIS
v.
GOLDSCHMIDT.

it amounted to positive impracticability, could not controul the express words of the Testator's declaration (*a*); and the language of the clause immediately following that last mentioned shews plainly that the Testator conceived his sister could not die leaving any child that would not be provided for by him.

The case of *Andrews* v. *Partington* (*b*), and others of that class, proceed upon a principle altogether different, namely, the inconsistency of the intents manifested, which rendering it necessary to repudiate one, the Court adopts that which is considered as most convenient

I am of opinion, that it was the intention of this Testator not to exclude any of his sister's children, and that intention must be complied with, even to the extent of impounding the whole residue, should that appear to be necessary (*c*).

"*Declare*, That according to the true construction of the Will of *B. A. Goldschmidt*, the Testator in the pleadings mentioned, the children of the said Testator's sister, *Theobaldina Goldschmidt*, now born, or hereafter to be born during her life, are, and will be entitled, each of them, to the legacy or sum of £2000. Decree

(*a*) See post *Bernard* v. *Mountague*.

(*b*) 3 Bro. 401.

(*c*) See *Smith* v. *Streatfield*, ante, p. 358, and *Ayton* v. *Ayton*, 1 Cox, 127, where, on a rehearing, although the Master of the Rolls (Sir *Lloyd Kenyon*), held that the words were not sufficiently strong to extend the distribution of the residue to children born after the death of the Wife, yet, he seemed to consider that the inconvenience attending a different construction would not alone prevail to controul a manifest intention.

that, the sum of £7800, the residue of the amount of the legacies to the four children now born, after deducting the legacy duty, be paid by the Defendant, *Lion Abraham Goldschmidt*, into the bank, with the privity of the Accountant General, in trust in this cause; and declare the trusts thereof accordingly. Declare, that the four children of the Testator's sister, *Theobaldina Goldschmidt*, admitted by the Defendant's answer to be now born, are entitled each to one-fourth part of the said bank annuities, and that the same shares will be payable to such of them respectively as are sons upon their attaining their respective ages of twenty-one years, and to such of them respectively as are daughters upon their attaining their respective ages of twenty-one years, or days of marriage; subject nevertheless, as to the shares of the daughters, to the directions given by the Will touching a settlement thereof; the said children of the Testator's sister to be at liberty to apply to the Court for a transfer or settlement of their respective shares, upon either of the above events happening, as they shall be advised. And in the mean time, and until the said bank annuities shall be transferred to the said children, or settled as directed by the Will. Order that the dividends of the said bank annuities be from time to time paid unto the said *Theobaldina Goldschmidt*, for her separate use, during her life, or until the further order of this Court, and upon her death, in case the same shall happen before the transfer of the whole or any part of the said bank annuities, any person or persons are to be at liberty to apply, &c. respecting the said dividends.-- Refer to the Master to enquire, and state whether the said *Theobaldina Goldschmidt* has, since the date of the said Testator's Will, had any other children besides the four admitted in the Defendant's Answer, and to state the names and ages of all the children of

1816.

DEFFLIS *v.* GOLDSCHMIDT.

the said *Theobaldina Goldschmidt*, in case any of them are dead, with the date of their respective births and deaths, and also to inquire what will be a proper sum to be set apart to answer the legacies of £2000 each, to the children of the said *Theobaldina Goldschmidt*, who may hereafter be born; and in making such inquiry, to have regard to the age of the said *Theobaldina Goldschmidt*, and to state his opinion thereon with any special circumstances."—Account of what due for interest of the Legacies of £2000 each, to the said four children, at the rate of £4 *per cent.* from the end of one year after the Testator's death, to be paid to *Theobaldina Goldschmidt*, for her separate use, &c. (*a*).

(*a*) Reg. Lib. A. fo.

ROLLS.
*May* 31.
*June* 18—25.

## BERNARD *v.* MOUNTAGUE.

Devise upon trust, by mortgage, or out of the rents and profits, to pay debts, and afterwards to raise portions for the Testator's daughters, "such portions to become due, and be considered as vested at the expiration of two years next after my decease, *if my debts shall be then paid.*" This is a condition precedent to the portions becoming vested; and, one of the daughters having died while her portion remained unpaid, upon a question between her representative and the persons who would be entitled in the event of the portion not having become vested in her life time, an Inquiry was directed as to the time when the debts were, or might have been, paid.

THE questions in this case arose on the construction of the Will of *James Irving*, Esq. whereby the Testator gave his estate and plantation in the Island of *Jamaica* to Trustees for a term of five hundred years, and, subject thereto, to the use of his four sons as tenants in common, and declared the Trusts of the five hundred years' term as follows:—

"Upon trust, in the first place, by mortgaging the premises therein comprised, or a competent part thereof, and by and out of the rents and profits thereof in the mean time, or by either of these ways and means, to pay off, satisfy, and discharge such of my debts as my personal estate shall fall short of satisfying; and, upon further trust, by the means aforesaid, or either of them, to raise and levy the sum of £2200 a piece for my daughters, *A. S. I.*, *M. B.*, and *S. I.*, and such other daughters as I may hereafter happen to have, either born in my lifetime, or after my decease, as, and for their portions respectively, *such portions to become due, and to be considered as vested in my said daughters respectively, at the expiration of two years next after my decease, if my debts shall then be paid, but*, nevertheless, *so as that such portions shall not bear or carry any interest;* and upon further trust, by and out of the rents and profits of the premises comprised in the said term of five hundred years, to levy and raise the yearly sums hereinafter mentioned, as and for the maintenance of my said three daughters respectively, and such other daughter or daughters as I shall so hereafter happen to have, as aforesaid, *until their respective portions shall become payable, and shall be actually so raised as aforesaid;* that is to say, unto, or for such of them as shall be under the age of thirteen years at the time of my decease, the yearly sum of £60; and afterwards to and for them, and to and for such other or others of my said daughters, as at the time of my decease shall not have attained the age of eighteen years, the yearly sum of £80 a piece, until they shall respectively attain the said age of eighteen; and afterwards to and for the same daughters, and also to and for such other or others of my said daughters as shall not at the time of my decease have attained the age of twenty-one years, the yearly sum of £100 a piece, *un-*

1816.

BERNARD
v.
MOUNTAGUE.

*til their said respective portions shall be actually levied and paid to them respectively, as aforesaid.*"

The Term was then declared to be upon further trust to pay certain annuities to the Testator's sons, also "*until his debts should be paid;*" and then followed:— "Provided always that, in case any of my said daughters shall happen to die *before the portion or portions hereby provided for her or them respectively, as aforesaid, shall become due or vest*, then, and in such case, the portion or portions of her or them so dying shall not be raised, but shall sink into my real estates charged therewith, for the behoof of the several persons then beneficially interested, in the inheritance thereof as aforesaid, unless my said daughters, so dying as aforesaid, shall leave issue of their bodies lawfully begotten; and in such case I give, devise, and bequeath the part or share of such of my said daughters so dying, to the issue of such daughters, for their support and maintenance, share and share alike."

The Testator then, after reciting that he had by settlement made over and conveyed to divers of his said children certain negro and other slaves, without whose labour and service the work of the estates would not be conveniently carried on, proceeded to direct "that neither of the said children should take or draw off his said estate, without the consent of his Executors and Trustees therein named, any of the said slaves so conveyed to them, but should permit and allow the said slaves to remain, and be employed on the said estates "*until his, the said Testator's debts, and the provisions for his said daughters should be raised and paid, and the said other Trusts satisfied and fulfilled.*"

All the Testator's daughters mentioned in his Will

died in his lifetime, except *Margaret*, the wife of *Charles Bernard*, who was of the age of eighteen at the time of his death in 1775.

The Trustees, who were also Executors, proved the Will, and took possession of all the real and personal estates of the Testator, but did not, for a long while after the Testator's decease, proceed to the payment of his debts, and never paid to *Margaret*, or her husband, either her portion of £2200, or the annuities given in the mean time until the portion should become payable.

*Margaret Bernard* died in 1781, leaving her husband and three children surviving her; of which children, *Charles*, the eldest, died in his infancy, *James*, the second, died also under age and unmarried, and *Rebecca*, the third, became the wife of the Defendant *Barker*, and died leaving four children, who were also Defendants.

After the death of *Margaret*, *Charles Bernard*, her husband, married again, and had issue the Plaintiff in this suit, to whom, in the event of the death of his second son by the former marriage under twenty-one, (which event happened), he, the said *Charles Bernard*, devised all his real and personal estate, subject to the payment of £2000 to his daughter *Rebecca*.

The Bill was for an account and payment of the portion of £2200, given by the Will of *James Irving* to his daughter *Margaret*, alleging the same to have become vested in her during the coverture.

The Defendant, *Barker*, claimed one-third of this portion as the personal representative of his deceased

1816.
BERNARD v. MOUNTAGUE.

wife *Rebecca*, insisting that the same was never vested during the life of *Margaret*, but became payable to, and distributable among, her three children after her decease.

The principal question in this case was, as to the time when the portion became vested.

*Bell* and *Blenman*, for the Plaintiff.

Either this portion vested at the expiration of two years from the death of the Testator, or the case must be considered as falling within the rule in *Sitwell v. Bernard* (a), and the portion to have become payable at the end of one year, as the reasonable period within which it might have been paid. As it was said in that case, it is impossible the Court should decide, either that it rested with the discretion of the Trustees, or depended upon the greater or less degree of diligence which they might exert in getting in the estate (b). See also *Hutcheon* v. *Mannington* (c).

By this Will, indeed, it is directed that the portions shall become due, and be considered as vested, at the expiration of the two years, "if the Testator's debts shall then be paid." At all events, therefore, they must be considered as having vested at that period, unless it be shewn that the contingency with which the vesting is made to be accompanied, did not in fact take place. And, in order to support such a construction at all, it must be supposed that the Testator had in contemplation the possibility of his Trustees neglecting their duty as Executors, and wilfully delaying the

(a) 6 Ves. 520.
(b) See p. 529.
(c) 1 Ves. jun. 366.

administration of his estate, and that, by this clause, he actually meant to empower them so to conduct themselves. The only reasonable meaning to be imputed to the Testator, on the contrary, is, that his Trustees might not be embarrassed by being called upon within the period at which he computed that they might be able conveniently to settle his affairs, and that he accordingly fixed upon the two years as that period of indulgence.

Again, if the Testator meant that the Legacies should not be paid, even at the end of the two years, unless his debts were previously discharged, it does not follow that he intended they should not vest in interest previous to that indefinite period. The words "to become due, and be considered as vested," seem to apply only to the actual payment of the portions. The becoming due, and being vested, are used as synonymous, and "vested," therefore, means vested in possession. It has been decided in many cases, that where payment of a legacy is postponed only with reference to the convenience of the estate, the legacy becomes vested in interest immediately; and, according to the true construction of the Will, the present falls within that class of cases.

*Hart* and *Champain*, for the Defendant, *Barker*.

*Bernal*, for the Infant Children of *Barker*.

The Court has never gone the length of saying, that a discretionary power with regard to the time of paying legacies may not be granted. and nothing can be more clear than the expressions by which such a discretionary power is given by this Will, making the vesting of the portions absolutely depend on the con-

1816.

BERNARD v. MOUNTAGUE.

dition of the debts being previously paid. If the Trustees had had power to raise the money for payment of the debts by sale, the case might have been somewhat different. But here their power extends no further than to the perception of rents and profits, or mortgage; and, where the means of paying the debts are thus limited, it is reasonable to infer that the Testator may have contemplated a longer period as necessary for the discharge of them. Then follows the proviso that, in case of the death of any of his daughters "before their portions should become due, or vest, as aforesaid," the same should fall back into his estate, unless they left Issue, in which last case, he gives such portions to their respective Issue. This effectually precludes the interpretation of the word "vested," as "vested in possession" and not in interest.

Both the cases cited differ from the present, because the express words of condition used by this Testator were there wanting. That of *Small* v. *Wing*, (*a*), is much nearer to this. There, the Executors were to raise and pay the debts out of the rents and profits of the estate, and they were directed, out of the said rents and profits, to raise and pay to his daughter a legacy of £1000, "after his debts should be paid, but not before." Lord *Macclesfield* was of opinion, that the debts could not be raised by sale of any part of the estate; and that, it appearing to be the Testator's intention that the debts should be satisfied before the legacy, and there being no direction in the Will for the legacy carrying interest, the Bill should be dismissed, so far as it sought interest upon the same. Afterwards, on Appeal to the House of Lords, the Decree was affirmed, except as to

(*a*) 3 Bro. P. C. 503. In *Tomlin's* edition, Vol. VI. p. 66.

1816.

Bernard v. Mountague.

the dismissal of the Bill seeking payment of interest, and it was referred to the Master to inquire at what time the debts might have been paid out of the yearly rents and profits of the estate, if the same had been duly applied.

*Bell*, in reply.

In this case, the direction to the Trustees is to raise, either out of the rents and profits or by mortgage; not by perception of rents and profits only; and, where Trustees are appointed for an especial purpose, they are not at liberty to use their own discretion with regard to the means of effecting that purpose, so as to affect the rights and interests of others. In *Hutcheon* v. *Mannington* (a), Lord *Thurlow* observed, that there was an indication of some intention on the part of the Testator, that the Legacies should not vest until a future period, but that he had not expressed that intention in so definite a manner as to enable the Court to act upon it. In this case, the Testator has said, the portions shall vest at the end of two years, if his debts are then paid. He has not said, they shall not vest at that time, *unless* his debts are then paid. He does not seem, himself, to have entertained any very distinct idea upon the subject; but he could never have meant to defer the vesting of these portions until an indefinite period. Yet, this must be the consequence of the construction contended for. In *Hutcheon* v. *Mannington*, there is no doubt, the Testator had some meaning by the words which he used; yet Lord *Thurlow* rejected these words altogether.

(a) 1 Ves. jun. 366.

1816.

BERNARD v. MOUNTAGUE.

*The* MASTER *of the* ROLLS

Deferred pronouncing his judgment, desiring that the counsel for the Plaintiff would consider the case of *Small* v. *Wing*, which had been cited, for the Defendant.

*June* 18.

The case was mentioned again; and, for the Plaintiff, it was contended that the Court would never direct such an inquiry as appeared to have been directed in *Small* v. *Wing*, the effect of which was to throw on the Court the burthen of deciding whether an Executor, to whom such a discretion as this was given, had or had not used proper diligence in paying the debts. That the case of *Small* v. *Wing* was an obscure case in itself, to be found no where but in the Collection in which it was first published, where it was printed without the assistance even of a marginal note, and having never once been referred to in any of the several cases which had come before the Court on the subject of the vesting of Legacies.

*The* MASTER *of the* ROLLS.

*June* 25.

The principal question here is, at what time the portions given by the Will of this Testator to his daughters are to be considered as having become vested. The payment of the debts is certainly made a condition precedent to their becoming vested. The direction that they shall be considered as vested at the expiration of two years, if his debts shall be then paid, cannot be construed otherwise than as if the Testator had said, after two years, *and* payment of his debts.

2

The Testator has likewise made the payment of his debts the period at which certain other payments, directed by his Will, are to commence, and others again to cease. He gives annuities to his sons, "until his debts should be paid;" and, with respect to the portions to his daughters, he provides that, in case any of them die before their portions become due or vest, the portions of those so dying shall not be raised, unless they leave Issue, to whom such portions are then given.' It seems to me, from the several parts of the Will, that there is no doubt as to the intention of the Testator, who has clearly made the payment of his debts the condition upon which the portions to his daughters are to vest.

But then it is said, that this is an intention, however it may be manifested, not to be regarded: for, if it is, either the actual payment or non-payment of the debts must be made the criterion by which to determine whether the portions become vested or not, and so, the interests of the daughters be made to depend altogether on the conduct of the Trustees, and the diligence used by them in paying the debts; or an inquiry must be instituted, at what time the debts might have been paid by a due application of the means of payment; and it is urged that, in the one case, it would be leaving a dangerous discretion in the Trustees, who could not be suffered, by their conduct, to affect the rights of the parties in so important a point as the period of their legacies vesting, while, in the other case, it would be most inconvenient to impose upon the Court the burthen of judging at what time the debts might, or ought, to have been paid. But, in answer to this, and without denying the inconveniencies which exist in this view of the subject, it is certainly a very strong

1816.

BERNARD v. MOUNTAGUE.

proposition to say, either that a Testator has no power to make such a provision, or (which is tantamount to such a declaration) that the Court will pay no regard to it when made. This argument does not appear to have been urged in the case of *Small* v. *Wing*. Shall the objects of a Testator's bounty be at liberty to say, you have fixed the time before which your bounty to us is not to have effect, but we will defeat your intention, and take present and vested interests, although you meant that they should be future and contingent.

*Sitwell* v. *Bernard* is not an authority for the present case, any more than *Hutcheon* v. *Mannington*, because, in neither of those cases had the Testator expressed his intention with any definite certainty. In *Gaskell* v. *Harman* (a), the question before me was, whether the bequest was in such terms as to vest the entire residue immediately on the death of the Testator, or only from time to time as the effects should be got in and received by the Executors; and I was of opinion, that the Testator had clearly expressed the latter intention, and decided accordingly. When the decree was afterwards drawn up, it was so expressed as that the residuary property was declared to vest only as it was received and converted into money. This was not my meaning, which went to the collecting of the effects, not to their conversion, by the Executors. The *Lord Chancellor*, upon appeal (b), doubted if the Will had made such a construction necessary, and pointed out very strongly the inconvenience of making it depend on the coming in of the estate, as money, into the hands of the Executors. But it was nevertheless his opinion that, if the intention is

(a) 6 Ves. 159. (b) 11 Ves. 489.

clearly expressed, it must be carried into execution, notwithstanding the inconvenience attending it (*a*); and he appears, accordingly, in this case of *Gaskell* v. *Harman*, to have, at last, entertained the same view that I did; for the declarations as to which my decree was reversed, were directed to points which constituted no part of my judgment upon the question at issue.

With regard to the case now before the Court, I have already expressed my opinion that the Testator's intention is too clear to be mistaken. As to the question of fact, whether the debts *were, or might have been*, all paid before the death of *Margaret Bernard*, there must be an inquiry directed to ascertain it. The case is not so simple as that of *Small* v. *Wing*, where, the direction to raise money for the payment of the debts being confined to the rents and profits of the estate, the time at which they might have been paid by applying the rents and profits in the discharge of them, was capable of being exactly computed. Here the Executors have the alternative of raising the money, either out of the rents and profits, or by mortgage. It will be very difficult, therefore, to determine at what period they might have raised sufficient for payment of all the debts. But, in creating this alternative, it must be taken that the Testator did not give to the Trustees a power which they were at liberty to exercise according to their own pleasure; as in *Gaskell* v. *Harman*, where a power was given to the Trustees to raise the money by cutting timber, the *Lord Chancellor* lays it down very distinctly that no fraudulent or unnecessary delay on their part should affect the interests of third persons,

(*a*) See the *Lord Chancellor's* words in the report of the case, p. 497, 498.—And see *Elwin* v. *Elwin*, 8 Ves. 547.

1816.

BERNARD v. MOUNTAGUE.

and that they should not be allowed, by neglecting to use proper diligence in the employment of the means entrusted to them, to favour one class of persons at the expense of another (*a*).

As to the interests which the grandchildren of Mrs. *Bernard* would take; (*b*) supposing it to turn out, upon inquiry, that the portion did not vest before her death, I am of opinion, that there is nothing in the clause directing the portion to go over in that event, that should confine its operation, but that the grandchildren will be entitled, as well as the children, under the general description of "Issue."

(It was referred to the Counsel on each side to settle the terms of the inquiry).

(*a*) 11 Ves. 507.

(*b*) This point had also been raised in the cause.

---

*July* 12.

## EARL OF ABERGAVENNY and Another, v. POWELL and Others.

Publication ordered of the depositions of a deceased witness, examined on behalf of the Defendant, under the Plaintiff's commission, on a Bill to perpetuate testimony.

THE Bill was to perpetuate the testimony of witnesses to the facts therein stated, touching certain Iron Works in the county of *Monmouth*, called *Blanarvon* Iron Works, claimed by the Plaintiffs, the Earl of *Abergavenny* and his Lessee. The Defendants joined in the commission sued out by the Plaintiffs to examine witnesses; which was executed; and witnesses were examined, both on behalf of the Plaintiffs and of the Defendants.

1816.

Earl of ABERGAVENNY v. POWELL.

*Sir S. Romilly* and *Blake*, for the Defendants,

Moved that publication might pass of the depositions of one *Isaac Hughes*, a witness examined on behalf of the Defendants, and since deceased, as being material to be produced by the Defendants on the trial of an action at law then depending for recovery of the possession of the said Iron Works.

This Motion was opposed by *Roupell*, upon the ground that a Defendant has no right to examine witnesses under the Plaintiff's commission.

The Motion was ordered to stand over to enquire into the practice; and on a subsequent day it was mentioned by *Blake*, that, although no distinct authority could be found in the affirmative, yet he found it laid down as a rule that, when, on a Bill to perpetuate testimony, the Defendant does *not* examine witnesses, he is entitled to costs.

*The Lord* CHANCELLOR

Made the Order, observing that, in the absence of direct precedent, he considered the rule referred to as constituting a sufficient negative authority; and added that the order for payment of the Defendant's costs always recites that he has not examined witnesses under the commission (*a*).

"Ordered. That the depositions of *J. Hughes*, a witness examined on behalf of the Defendants under the commission issued in this cause for perpetuating the testimony of witnesses, be forthwith published. But

(*a*) Vide *Foulds* v. *Midgley*, 1 Ves and B. 138.

1816.

Earl of ABERGAVENNY *v.* POWELL.

the Plaintiff's clerk in Court is not to publish the depositions of the other witnesses" (*a*).

(*a*) Reg. Lib. A. fo. 1261.

---

SAMUEL WHALLEY, CHARLES HARRISON, and ELIZABETH his Wife, (formerly ELIZABETH WHALLEY,) and CATHARINE WHALLEY - - - PLAINTIFFS

AND

DANIEL WHALLEY - - DEFENDANT.

ROLLS.

*June* 25. *July* 15.

A conveyance of a reversionary interest from an Uncle to a Nephew, under circumstances of gross inadequacy of price and alleged fraud, attempted to be set aside after 40 years; but held to be supported by the consideration of natural love and affection, inserted in the witnessing part of the deed, although not expressed in the recital.

Q. As to the effect of length of time in such a case, operating by way of evidence?

Q. As to the effect of gross inadequacy of price, as evidence of fraud?

*JOHN EYRE*, by his Will, dated the 29th of *Sept.* 1767, devised to his wife, *Rebecca Eyre*, all his freehold and copyhold estates for her life, and died abroad in *February*, 1772, intestate as to the remainder of his said estates expectant on the death of his wife, and also as to his personal property, leaving *Samuel Whalley*, who was then eighty years of age, his heir at law.

By indentures of lease and release, dated the 22d and 23d of *December*, 1772, (but which were not in fact executed till the 7th of *January* following,) made between the said *Samuel Whalley*, of the one part, and *Daniel Whalley*, (who was a nephew of *Samuel*,) of the other part, after reciting that *Samuel Whalley* had contracted and agreed with *Daniel*, for the absolute sale to him of the fee-simple and inheritance of the said freehold and copyhold estates, subject to the life estate of the widow, and that, upon the treaty for the sale, it was agreed between them, that *Daniel Whalley* should, as and for the consideration

of the said sale, secure to be paid to *Samuel Whalley* a clear annuity of £100 during his life, and should also secure to be paid to *Martha Linwood*, sister of the said *Samuel Whalley*, a like annuity of £30, to commence at the death of *Samuel*, and to continue so long as she should survive him; and after further reciting that *Daniel Whalley* had accordingly, on the day of the execution of the said indenture of release, entered into a bond to *Samuel* in the penal sum of £1000, conditioned for payment of the annuity of £100, and had also entered into another bond for the payment of the annuity of £30, to the said *Martha Linwood*, in case of her surviving her brother, it was witnessed that the said *Samuel Whalley* did, in consideration of the annuities so secured as aforesaid, *and in consideration of the natural love and affection which he then bore to the said Daniel Whalley*, grant, bargain, and sell, to *Daniel*, his heirs and assigns, all the said freehold estates, and covenant to surrender the copyholds, (which were afterwards duly surrendered accordingly,) to and to the use of the said *Daniel Whalley*, his heirs and assigns, subject to the said life estate of the said *Rebecca Eyre*, of and in the same.

*Samuel Whalley* died about a year after the date of this conveyance, leaving *Peter Whalley*, his heir at law, who died abroad, in the year 1791, having devised to the Plaintiffs, (his three children), and their heirs, "all his real estates of which he was seised, or to which he had any claim, or was in any way entitled."

*Martha Linwood* died the year after her brother's death, and *Rebecca Eyre*, the widow, also died in the year 1782, from which time *Daniel Whalley* continued in possession of the estates under the conveyance.

1816.

WHALLEY
v.
WHALLEY.

The Plaintiffs, the children of *Peter Whalley*, were all infants at the time of their father's death but *Samuel*, the eldest son, and heir at law, (who was consequently the heir at law of the old *Samuel Whalley* also,) commenced a suit in the Exchequer, in the year 1794, against *Daniel Whalley*, to set aside the conveyance; which suit he was unable to prosecute on account (as it was said) of the embarrassed state of the circumstances.

The present Bill, which was filed in 1812, by all the three children of *Peter Whalley*, as Devisees under his Will, stating these facts, alleged that, at the time of the death of the Testator, *John Eyre*, *Samuel Whalley* was in very indigent circumstances, in an infirm state of mind, and dependent for support on his nephew *Daniel*, who, having formed a scheme to secure to himself the reversion of the estates, did, in pursuance of that scheme, prevail on *Samuel*, for an inconsiderable sum of money, to make a Will, devising the same to himself; and, shortly afterwards, fearing that the Will might be revoked, procured him to execute the conveyance already mentioned. The Bill went on to state that the value of the reversion, at the time of the execution of this conveyance, exceeded £10,000, and that of the two annuities was not more than £400, and, moreover, that both the Will and the Deed were prepared by one *Garth*, (since deceased,) who was *Daniel Whalley's* attorney and introduced by him to *Samuel* for the purpose. Then, alleging that the Defendant, having obtained the conveyance by practice, and for a grossly inadequate price, ought to reconvey to the Plaintiffs, and account with them for the rents and profits of the estates, upon being allowed the amount of what had been *bonâ fide* advanced and paid by him by way of consideration for the same, with interest, the Bill prayed accordingly.

The Defendant, *Daniel Whalley*, by his answer to the original Bill, denied the alleged poverty and imbecility of *Samuel Whalley* at the Testator's death, and his dependance on the Defendant for support, or that he gave, or offered to give, any sum of money, or used any other means, to persuade the said *Samuel Whalley* to make a Will in his favour, or afterwards to sell him the reversion of the descended estates, alleging, on the contrary, that *Samuel Whalley*, who was his uncle and had always lived with him in habits of great familiarity and entertained a great regard for him, did, "in consideration of the love and affection he bore him, and in order to bestow a benefit and advantage upon him, and also with a view of making an additional provision for himself and his sister, *Martha Linwood*, propose to convey the reversion to the Defendant for an annuity of £80 to himself, and of £20 to *Martha Linwood*, to commence after his death; which sums the defendant himself insisted should be increased to £100, and £30 respectively and that thereupon an agreement was made and entered into between them to such effect;" in pursuance of which the indentures of lease and release already mentioned were executed, the consideration of "the love and affection which *Samuel Whalley* then had, and bore to the Defendant," being inserted therein.

The Defendant further alleged that *Garth*, who prepared the deeds, was a solicitor of extensive practice, and great reputation, and had been employed as such, both by the Testator, *John Eyre*, and his widow; and that the instrument itself was read over to *Samuel Whalley*, and fully understood and approved by him, some days previous to its execution.

With regard to the value of the annuities, the De-

1816.

WHALLEY
*v.*
WHALLEY.

fendant admitted that it was much less than the value of the Reversion to be sold, but contended that, under the circumstances, the consideration for the grant ought not to be regarded as grossly inadequate, nor the Plaintiffs held entitled to a re-conveyance; and he claimed the benefit of the Statute of Limitations.

In his Answer to the amended Bill, the Defendant admitted that, although *John Eyre*, the Testator, died in *February* 1772, yet, as he died abroad, his death was not known, either to the Defendant or to *Samuel Whalley*, until the 25th of *September*, the day on which *Samuel* made his Will, the circumstances attending which he stated to have happened in the following manner:—That, in the said month of *September*. the Defendants, being desirous of hiring for a country residence certain premises, part of the estates of the said Testator, and finding, by a hand-bill referring to *Garth*, with whom he was previously unacquainted, that the same were to be let, applied to *Garth* accordingly for the particulars, and was then informed by him that they could be let only from year to year, as the Testator was dead, and his Widow only tenant for life under his Will, and he, *Garth*, did not know who was the heir at law of the Testator. That, upon this, the Defendant himself informed *Garth* that his uncle *Samuel Whalley* was the heir at law, and that, afterwards, meeting with his Uncle, he acquainted him with the circumstance, and took him with him to *Garth*, who informed him of his reversionary interest, and that he had the undoubted right of disposing of it as he pleased: adding, "As you are an old man, perhaps the best way will be to make a Will," to which *Samuel Whalley* replied, "He thought so to," and desired *Garth* to draw a Will; when, upon *Garth's* asking to whom he would devise his reversionary In-

terest, he said, "To my Nephew," pointing to the Defendant; whereupon the Will was drawn and executed accordingly on the spot.

The Answer then went on to state several other circumstances as to the great intimacy and affection which subsisted between *Samuel Whalley* and the Defendant, and also as to a quarrel, which had taken place between him and the family of *Peter Whalley*, with whom he never kept up any sort of intercourse. It admitted the suit in the Exchequer, stating that the Bill had been dismissed for want of prosecution, and submitting that, from the length of time which had elapsed since the dismissal, the Plaintiffs ought to be considered as having waived and abandoned their claims.

The Defendant, *Daniel Whalley*, died after putting in this Answer; and the suit was revived against his real and personal representatives.

The Answers, as to all the material facts, were supported by evidence. Evidence was also gone into by the Plaintiffs, as to the alleged value of the estates at the time of the transaction, making it amount in the whole to about £6000.

*Sir Samuel Romilly*, *Bell*, and *Wakefield*, for the Plaintiffs.

Length of time cannot affect this case. The Statute does not apply, and it is not easy to discover for what purpose it is here insisted on. Time is no bar to relief in Equity, unless it be in the excepted cases of mortgage, &c. In all other cases it only operates by way of evidence. On such a question as this, Lord

1816.

WHALLEY
v.
WHALLEY.

*Erskine's* opinion must be considered as of the highest authority. *Morse* v. *Royal* (*a*); see also *Pickering* v *Lord Stamford* (*b*). Here the property has never changed hands, and the circumstances of the case are such as to prohibit any conclusion to the disadvantage of the present claimants from the date of the transactions. No claim could have been made till the death of Mrs. *Eyre*, in 1782; and then, or shortly afterwards, *Peter Whalley* was abroad, and so continued till his death. The suit commenced in the Exchequer interrupts the time which then began to run, and the subsequent delay is sufficiently accounted for.

If time is no bar, then the case rests on the gross inadequacy of price, and the fraudulent, or at least suspicious, nature of the transaction: as to the latter ground, the value of the estates at the time of the conveyance must be taken as proved, there being no evidence to the contrary; and the reversion was worth at least three-fifths of the whole inheritance. The policy of the Court would never permit such a transaction, as a recent transaction, to stand. *Gowland* v. *De Faria* (*c*). *Peacock* v. *Evans* (*d*). In such a case,

(*a*) 12 Ves. 355. vid. p. 371.

(*b*) 2 Ves. jun. 272. p. 280. See also, as to length of time being no bar in cases of fraud, *Deloraine* v. *Browne*, 3 Bro. 633. *Smith* v. *Clay*, 3 Bro. 639, n. *Hercy* v. *Dinwoody*, 4 Bro. 258. 2 Ves. jun. 87. *Tate* v. *Mosely*, 5 Ves. 480. *Moth* v. *Atwood*, 5 Ves. 845. *Purcell* v. *Macnamara*, 14 Ves. 91. *Beckford* v. *Wade*, 17 Ves. 87. *Hovenden* v. *Ld. Annesley*, 2 Scho. and Lef 607, 630. *Moore* v. *Blake*, 1 Ba. and Be. 62. *Medlicot* v. *O'Donnel*, *ibid.* 156. See *Gould* v. *Okeden*, 4 Bro. P. C. 198. (*Tomlins'* ed.)

(*c*) 17 Ves. 20.

(*d*) 16 Ves. 512. See also *Bowes* v. *Heaps*. 3 Ves. and

1816.

WHALLEY v. WHALLEY.

inadequacy alone is a sufficient ground for setting aside an agreement between parties who in themselves are competent; and the inadequacy in the present case is greater than that which has been made the ground of any former decision. The deed itself is evidence of the fraud; the agreement which it recites is a mere dry contract for the purchase of the reversion by the grant of the annuities. The consideration of "natural love and affection" is, indeed, inserted in the operative part of the deed, as the result of an afterthought; but it formed no part of the bargain itself, which is a mere naked money bargain. *Filmer* v. *Gott* (a). Besides, the consideration of love and affection would have extended to the other relations, who are disinherited by the Will; and although the deed makes a provision for the Sister, which is to take effect not till after the death of *Samuel Whalley*, she is left in the mean time without any support; and the Will, which is merely the commencement of the same transaction which the deed must be considered as having completed, makes no mention whatever of her.

It appears that *Garth* died in 1792; consequently, no direct evidence can now be procured as to the real consideration for the deed which he prepared, or the circumstances under which he prepared it. But, in the absence of such evidence, the instrument sufficiently explains itself.

*Hart* and *Bernal*, for the Defendants.

This transaction was not in the nature of a mere

B. 117. *Roche* v. *O'Brien*, 1 Ba. and Be. 330. *Mountnorris* v. *Day*, 2 Ba. and Be. 104. *Dunbar* v. *Tredennick*, *Ib.* 310.

(a) 7 Bro. P. C. 230, (Tomlins' ed.)

1816.

WHALLEY
v.
WHALLEY

money bargain; it was a family compact between an Uncle and Nephew, by which the one makes a settlement in favour of the other, reserving to himself a certain portion for his own life, and a smaller provision for a sister. He was himself an unmarried man, and he chose to constitute this Nephew the object of his bounty.

With regard to length of time, admitting that this case cannot be governed by a strict analogy to the rule of law, still it cannot be pretended that it does not afford evidence sufficient to raise a presumption in favour of such a transaction. In *Gregory* v. *Gregory* (*a*), it was allowed that the transaction, if it had been recent, was such as the Court would not have suffered to stand; but the lapse of eighteen years was held sufficient to establish it. The suit in the Exchequer, (of which it is to be observed that no mention was made in the Plaintiff's original Bill, it having been subsequently introduced by way of amendment,) was commenced in 1794, and this Bill was not filed before 1812, at a distance of eighteen years from that time. Supposing *Peter Whalley* to have died in 1791, the present Plaintiffs shewed, by analogy to the Statute, that they ought to have made their claim within ten years from that period. *Roe* v. *Rawston* (*b*).

In *Filmer* v. *Gott*, the case was widely different. There, it was clearly in evidence that the deed was obtained under circumstances of absolute mental incapacity; here, the allegations, both of imbecillity of mind and of pecuniary distress, rest on no support and are positively contradicted by testimony. In that case it was also proved that the words were surreptitiously inserted; and the Bill was filed shortly after

(*a*) Cooper 201. (*b*) 2 Taunt. 441.

the transaction took place. Here there is no evidence as to the occasion on which the consideration of natural love and affection was first introduced into the deed; but it is probable that the professional person employed in preparing it, observing the inadequacy of price to be such as might vitiate a mere pecuniary bargain, recommended the insertion of these words, in order to represent it, (such as indeed it was), as a transaction of a mixed nature, the consideration for which was compounded of family motives and a valuable compensation. Such an instrument as this can only be impeached in equity by the clearest evidence of a continued series of fraud; and in this case no such evidence exists, nor is attempted to be brought forward.

---

July 15.

*The* MASTER *of the* ROLLS.

This is a Bill to set aside, on the ground of fraud and imposition, a conveyance of an estate made so long ago as the year 1778. There were three questions raised at the hearing:—

*First*, Whether the transaction is to be considered merely as a sale?

*Secondly*, If it is, whether the inadequacy of price furnishes sufficient evidence of fraud?

And, *thirdly*, Whether, under the circumstances of the case, the length of time forms a bar to the relief?

As to the first, the conveyance, which is from an uncle to a nephew, purports to be made in consideration, not only of certain annuities, but also of "natural love and affection." If the Court is to take the

latter to have really formed a part of the consideration, there is an end of the Plaintiff's case: for, where bounty is intended, there is no room for the inference of fraud from the inadequacy of the price. Love and affection would alone have supported the conveyance, without any pecuniary consideration, and will equally support it when there is a pecuniary consideration wholly inadequate to the value of the estate.

But it was argued, that it is evident, from the recitals of this deed, that nothing but a sale for a pecuniary consideration was in the contemplation of the parties, and that the words "natural love and affection," afterwards thrown into the body of the deed, could not have the effect of wholly changing the true nature of the transaction. I own I was a good deal struck by the entire absence, in the recitals, of all allusion to any intention of bounty on the part of the Grantor, in a case where, from the great disproportion between the price and the value, it was much more properly a gift than a sale that he was making to his nephew. But, on looking into the case of *Filmer* v. *Gott* (a), where this point underwent so much consideration, I find that, in this particular, the conveyance was open to the same observation. The recital stated nothing but the pecuniary consideration, as being the foundation of the deed. The words "love and affection" were introduced afterwards, just as they are here: yet it was thought necessary, first by the Court of Chancery, and afterwards by the House of Lords, to direct an issue to try whether love and affection did really make a part of the consideration for the conveyance. Now if, even in the very suspicious circumstances under which the deed had, in that case, been

(a) 7 Bro. P. C. 70.

executed, and with such evidence as there was against the Defendant, from his own admissions, it was still thought impossible to consider it as not speaking the actual sense of the party executing it, until the contrary was found by a jury, it would be a great deal too much for me to determine that love and affection formed no part of the consideration in this case, where there is no circumstance from which I can infer that *Samuel Whalley* did not fully understand the nature and effect of the instrument that is now impeached.

To direct a trial would be nugatory, even if there were any thing like a ground laid for it. The Plaintiffs have no evidence but the Answer of the original Defendant. He has made no such admissions as were in proof against Mr. *Gott*. Admitting the inadequacy of the pecuniary consideration, he has insisted on his uncle's intention of bounty in his favour.

Mr. *Garth* alone could have proved what instructions he received from *Samuel Whalley*, and it is to be presumed, from the respectable character which he bore, that nothing would be introduced into the deed that was not fully authorised, and fully understood by the person who was to execute it. It would be impossible, therefore, in contradiction to the Deed, in contradiction to the Answer, and to the Presumption, to find that love and affection did not constitute a part of the consideration.

The first point being decided against the Plaintiffs, it is unnecessary to consider either of the other questions.

[Bill dismissed, without costs.]

Rolls, *July* 26.

## GRETTON *v.* HAWARD.

Devise to the Testator's Wife; and after her decease to the heirs of her body share and share alike; and in default of issue to be lawfully begotten by him, to be at her own disposal. *A.* dies, and leaves six children by his said wife; held that the wife took an estate for life only, and that each of the six children took a fee-simple in remainder, expectant on the determination of the mother's life estate, in one sixth part, as tenant in common.

SEARLE EDWARD HAWARD, by his Will, devised as follows:—"To my wife, *Ann Haward*, all my real and personal estate, she first paying all my just debts and funeral expenses; and, after her decease, to the heirs of her body, share and share alike, if more than one; and, in default of issue to be lawfully begotten by me, to be at her own disposal." And he appointed his said wife sole Executrix and residuary Legatee of his Will.

The Testator left his said wife, and six children by her, him surviving.

A Bill being filed to carry the trusts of the Will into execution, the cause was heard at the Rolls, when his Honour was pleased to direct a case to be sent to the Common Pleas, containing, among others, the following questions:—

"What estate *Ann Haward*, the widow, took under the will of her late husband?"

"If an Estate for life only, then what Estate each of her children took under the said Will?"

This case was argued in *Michaelmas* term 1815, before the Judges of the Common Pleas, who returned the following Certificate, in answer to the two questions above stated.

1816.

GRETTON
v.
HAWARD.

"That *Ann Haward*, the widow, took, under the Will of her late husband, an estate for life only in the devised premises; and that each of her six children took, under the said Will, a fee-simple in remainder, expectant upon the mother's life-estate, in one undivided sixth part of the premises, as tenant in common with the other five children (a)."

Upon this certificate the cause now came on for further directions; when *Sir A. Piggott*, *Fonblanque* and *Shadwell*, contended against the Certificate, that the Widow took an Estate tail under the Will: and *Sir S. Romilly*, *Cooke*, *Bell*, *Wilson*, and *Rose*, appeared for different parties interested in support of it.

The Certificate was confirmed.

(a) See 6 Taunt. 94., and 2 Marshall 9, where the arguments on this case are reported.

1816.

ROLLS.
March 29.
July 29.

## WOODHOUSE *v.* MEREDITH.

*J. W.*, being seised and possessed of considerable freehold, copyhold, and leasehold estates in the county of *H.*, and in possession, as Mortgagee, of certain leasehold houses at *K.* in the county of *M.*, but having no other property in the said county of *M.*, and having other estates vested in him as Mortgagee, besides those at *K.*, makes his Will, devising "*all his freehold, copyhold, and leasehold messuages, &c. in the county of H., and in the town of K.*," to *A. W.* for life, and, after her death, "all and singular other his freehold, copyhold, and leasehold messuages," &c. in the counties of *H.* and *M.*, or elsewhere, to *E. W.* and *A. T.* for their joint lives, and, after their several deceases, "all the said freehold, leasehold, and copyhold messuages," &c. unto and equally among their children; and gives to *A. W.* "all the residue of his real estate not before disposed of, *and all other his estates and interests whatsoever, vested in him as Mortgagee, or Trustee*," &c. "and all the residue of his personal estate, ready money, and securities for money," &c. subject to the payment of debts and legacies. Held, that the mortgaged premises at *K.* passed under the devise of all the freehold, copyhold, and leasehold messuages, &c. in the county of *H.*, and in the town of *K.*

JAMES WOODHOUSE, by his Will, dated the 28th of *March*, 1806, after specifically devising certain real estates of which he was seised, and "all other his freehold, copyhold, and leasehold messuages, farms, lands, and tenements, whatsoever, and wheresoever, in the county of *Hereford*, and in the town of *Kensington*," to his wife, *Ann Woodhouse*, (since deceased), for her life, and, after her death, certain specific parts of his said real estates in the county of *Hereford* to such persons, and in such manner as therein mentioned, proceeded as follows: "Also, I give and devise all and singular other my freehold, copyhold, and leasehold messuages, farms, lands, tenements, hereditaments, tithes, and premises, whatsoever, and wheresoever, situate in the counties of *Hereford* and *Middlesex*, or elsewhere, not hereinbefore by me given and devised, unto, and equally between my cousins, *Edward Woodhouse* and *Ann Thomas*, for their joint lives, and the

life of the survivor;" with remainder to Trustees and their heirs during the joint lives of the said *Edward Woodhouse* and *Ann Thomas*, upon trust to preserve contingent remainders; but nevertheless to permit the said *Edward Woodhouse* and *Ann Thomas* to receive the rents and profits during their joint lives; and from and after their several deceases, I give and devise all the said freehold, leasehold, and copyhold messuages, farms, lands, tithes, and hereditaments, lastly herein before devised, unto, and equally between all the children of the said *Edward Woodhouse*, *Ann Thomas*, and *Mary Secretan*, during their joint lives," &c. and, after several remainders, concluding as follows:—"Also, I give and bequeath unto my dear wife, *Ann*, all the rest residue and remainder of all my real estate not hereinbefore disposed of, and all other my estates and interests whatsoever, vested in me as Mortgagee or Trustee, under, or by virtue of any Deed or Will, or otherwise howsoever, and all the rest residue and remainder of all my personal estate, ready money, and securities for money, book-debts, bills, bonds, notes, and all other my chattels, effects, and personal estate whatsoever, and of what nature, kind, and quality, soever, to hold to her my said wife, her heirs, executors, administrators, and assigns, subject and liable to the payment of all my just debts, funeral expenses, and legacies hereby given, and to the probate of this my Will." And the Testator appointed his said wife, and the before-mentioned Trustees, Executrix, and Executors, of his said Will.

At the time of making this Will, and of his death, the Testator was seised and possessed of considerable freehold and leasehold estates in the county of *Hereford*, and of personal property to a large amount; he was likewise mortgagee in possession of certain houses

1816.
Woodhouse
v.
Meredith.

and premises at *Kensington*, in the county of *Middlesex*, held under a lease from *Brasen-nose* College, in *Oxford*, by virtue of a deed of assignment dated the 22d of *October*, 1795. By a subsequent indenture, dated the 3d of *November* following, the same premises had been conveyed to him in trust to sell, and out of the produce in the first place to pay himself the sums due to him on the mortgage, and the surplus to the mortgagor; and he accordingly sold a part in his lifetime, but not nearly enough to pay the money due on the mortgage.

On the death of the Testator, which took place on the 16th of *January*, 1809, his widow entered into possession of the entire residue of the Testator's property devised to her by the Will, and, among the rest, of the leasehold premises at *Kensington*, remaining unsold, which, with the concurrence of the other Executors, she put up to sale by public auction, but died before any conveyance could be made to the purchasers, having first made a Will, and appointed the Defendant *Meredith*, who was also one of the Executors of her husband's Will, her sole Executor, by whom the sales were afterwards completed.

The Bill filed by *Edward Woodhouse* and *Ann Thomas*, and by their respective children, and the children of *Mary Secretan*, prayed a declaration that the Plaintiffs were entitled under the Will, as tenants for life, and in tail in remainder respectively, to all the leasehold premises at *Kensington*, belonging to the Testator at the time of his death, or in which he was interested, and to the monies arising from the sale thereof, and an account accordingly.

It was in evidence that the Testator was not, for a

1816.
WOODHOUSE
v.
MEREDITH.

long time, previous to the date of his Will, nor from thence downwards to the time of his death, seised or possessed of any estates or property whatever, either in *Kensington*, or in the whole county of *Middlesex*, except the above-mentioned leaseholds, with regard to which it appeared that the mortgagor and his representatives had at different times, both before and after the Testator's death, applied for an account. On the other hand, it appeared that the lease from *Brazen-nose* College had been renewed, in 1808, by the Testator, in his own name, he himself paying the fine and fees on renewal; and further, that the whole amount of the purchase monies received from the sale of the mortgaged premises was insufficient, by upwards of £500, to pay what was due for principal and interest upon the mortgage. It was admitted that the Testator, at the time of making his Will, had other mortgages besides the premises at *Kensington*.

The single question now was, whether these leasehold houses at *Kensington* passed, under the devise of "all the Testator's freehold, copyhold, and leasehold messuages, &c. in the county of *Hereford*, and in the town of *Kensington*," to his wife for her life, and afterwards, to the Plaintiffs, *Edward Woodhouse* and *Ann Thomas*, for their joint lives; or whether it formed a part of the residue given absolutely to the wife, under the description of "all other his estates and interests whatsoever *vested in him as Mortgagee or Trustee*, under or by virtue of any deed or will, or otherwise howsoever, and all the rest residue and remainder of all his personal estate, ready money, *and securities for money*, &c." and "all other his personal estate whatsoever."

*Sir Samuel Romilly*, *Bell*, and *Phillimore*, for the Plaintiffs.

1816.

Woodhouse v. Meredith.

The words in the first clause do not necessarily imply an absolute interest in the estates which it is intended to pass, but will extend to any interest of a limited nature. Then, with regard to the words "all other his estates vested in him as Mortgagee, &c." what do they amount to? Only to a disposition of that which he had not already disposed of. This is not the mere case of a mortgage, it being in evidence that the Testator considered himself as having acquired the absolute ownership; and, if it were not so, yet it is very clear that a man having the legal estate, may devise the property as land of inheritance if he pleases, notwithstanding the existence of an equity of redemption. *Clarke* v. *Abbot* (a), *Noys* v. *Mordaunt* (b), *Martin* v. *Mowlin* (c). Then the question resolves itself into a mere question of intention, which must be decided according to the presumption afforded by evidence; and here we have the case of an uninterrupted possession of the property for eleven years, coupled with the circumstance that there was no other property which could pass under the description of estates in the town of *Kensington*.

*Hart*, *Martin*, and *Dowdeswell*, for the Defendant, the Executor of the widow.

The evidence in this case is at least ambiguous. That which goes to establish the fact, that the Testator considered the property as his own proves too much, and that of the property having been mortgaged for more than its value not enough, since there is evidence on the other side that, as between Mortgagor and Mort-

(a) 3 Barn. 457, 461. Rep. Cha. 2. Cha. Prec. 265. 2 Eq. Ab. 606.

(b) 2 Vern. 581. Gilb.

(c) 2 Burr. 969.

gagee, it was treated as a redeemable estate up to, and at the time of, the death of the Testator. Therefore it follows that, at the time of making his Will, he was himself conscious of the qualified nature of his interest; and the question then arises, whether there is any sufficient evidence of intention to counteract the effect of express words;—whether the Court will exclude the operation of a specific devise in order to establish such a presumption. Admitting that there is no other property to which the first words will apply, still the Testator has used words, which in their strict acceptation will not suffice to pass that property, while in a subsequent clause he has given it by words which are immediately calculated to give effect to the bequest. The burthen evidently rests on the other side of making out a case of intention in contradiction to these express words; and the depositions on the part of the Plaintiffs fail to establish it. The cases cited, are wholly different.

*Sir Samuel Romilly*, in reply.

The Testator, after giving to his wife for life his leasehold estates in the town of *Kensington*, devises to the Plaintiffs all other his leasehold property in the county of *Middlesex*, not before by him given; and the first question is, whether the Testator had any property to which these latter words would apply. It is not whether he had the absolute property in any leasehold estates in *Middlesex*,—but any property—any interest whatever, which would be sufficient to raise a question of election. The answer is, that he had such an interest in these premises at *Kensington*; and, if the case rested here, the argument would be at least as good for the Plaintiffs as for the Defendant. Then, admitting the evidence as to the state of the property,

1816.
WOODHOUSE
v.
MEREDITH.

that makes the case quite decisive in favour of the former; for it is proved that there was no other property in the county of *Middlesex*, but that which is the subject of dispute; and it also appears that the Testator was in fact possessed of other mortgage property, to which the second residuary clause may strictly apply; so that the words "all *other* my estates vested in me as Mortgagee," being taken as necessarily referring to the former devise of these very mortgaged premises, so far from being against us, turn powerfully in our favour. Then, if the Testator meant that any thing should pass under the description of his leaseholds at *Kensington*, and in *Middlesex*, it is very evident that he intended the beneficial interest should pass, and not the bare legal estate, having given it for life to the same person, (his wife,) whom he afterwards constitutes his residuary legatee. To construe it otherwise would be, therefore, to make her a Trustee for herself, as to this particular portion of the residue.

---

*July* 29.

*The* MASTER *of the* ROLLS.

The only question in this case is, under which of the clauses in the Will the leasehold premises at *Kensington*, which the Testator had in mortgage, are to be considered as comprehended; whether under those in which he speaks of his "leasehold messuages," or under the residuary clause by which he disposes of "all other his estates vested in him as Mortgagee." In strictness, this was a mortgage, and not the leasehold property of the Testator; but the point now in dispute is, whether he did not intend, that what ever interest he might have in these premises should pass by the former clauses, although under an improper denomination.

It is admitted that the Testator had no leasehold property, either at *Kensington*, or any where else in the county of *Middlesex*, unless these mortgaged premises are to be so considered; and it is obvious, from the nature of the limitations and provisions in the Will, that, if they at all pass, it is the absolute interest in them, and not the mere legal estate, that is to be considered as being disposed of. Now it seems very clear that the Testator conceived there was some property in the town of *Kensington* which he might dispose of as his own; since it is, otherwise, impossible to account for his specifying that particular place. The residuary clause is by no means clearly expressed. If by "*other* estates and interests vested in him as Mortgagee," he means, other estates than those before given, that would imply that he had antecedently disposed of some mortgage property; but it does not appear what that could have been, unless the preceding clauses be taken to comprehend the premises at *Kensington*. But, supposing this residuary clause were to be construed as including *all* the Testator's mortgage estates and interests, still the question would remain, whether he intended to designate the *Kensington* property as part of his mortgage interest, or whether he intended to include it in the preceding clauses as part of that property which he conceived to be his own. It is admitted that the Testator had, in fact, other mortgages besides these premises at *Kensington*; so that the residuary clause will not remain inoperative, even supposing these mortgaged premises should not be comprehended in it.

In this respect, the case is distinguished from that of *Davis* v. *Gibbs* (a), in which it was impossible to give

(a) 3 P. W. 26.

1816.

Woodhouse v. Meredith.

effect to both clauses. That case, as far as relates to the present point, was, that the Testatrix gave all her real estates in three or four different counties; and in one of the counties specified, she had no property besides a mortgage interest. By another clause, she gave all her mortgages; but she had no mortgage but that already mentioned, which was, moreover, not a mortgage in fee, but a mortgage for a term of years. It was held to pass under the devise of her mortgages. But there a chattel interest, even if it had been absolutely her own, would not have been properly described as *real estate*, and there was an express disposition properly descriptive of this interest, which there would have been nothing to satisfy if the mortgage had been held to pass as real estates by the other clause. Here, on the contrary, the description of "leasehold messuages, &c." is applicable to the mortgaged premises; and the residuary clause has other subjects on which it may operate, while, if this property is held to be included in it, there is nothing to answer some of the words of local description used in the former clauses. The case of *Martin* v. *Mowlin* (a), is also clearly distinguishable from the present. There was nothing in the description in that case which required the mortgaged premises to be included; for the Testator had "lands, tenements, and hereditaments," in the manor of *Wyke Regis*, independently of the mortgage estate in controversy.

Upon the whole, I am of opinion that it was not by the residuary clause, but by the preceding clauses, that this Testator meant to dispose of whatever interest he had in the *Kensington* property, and, consequently, that the Plaintiffs are entitled to a decree.

(a) 2 Burr. 978.

1816.

ROLLS.
*March* 29, 21.
*July* 29.

## BOZON *v.* FARLOW.

Specific performance of an agreement for selling the business of an attorney, refused, upon the Bill of the vendor, there being no express stipulations by which the Court might be enabled to carry it into effect on his part, in return for the Defendant's purchase money; and there being no conditions generally applicable to transactions of this nature so as to come within the description of "usual clauses" to be inserted in an instrument to be drawn up in pursuance of the agreement. Qu. Whether such an agreement is in its nature valid, upon the ground either of morality or of public policy? Qu. If legally a valid agreement, whether it is of such a nature as is capable of being enforced in equity?

THIS was a Bill for the specific performance of an agreement contained in the following paper, which was signed by the Plaintiff and Defendant, and dated 23d of *June*, 1814.

"Propositions between Mr. *Farlow* and Mr. *Bozon*. Mr. *Farlow* proposes to give £3075 to Mr. *Bozon* for his business on the following condition:—First, £1000 to be paid on the 1st of *Sept.* next, from which time the business to be carried on in their joint names, and so to continue till within ten days from the end of *Easter* term next.—The remaining £2075 to be paid as follows:—£1000 in *Easter* term 1816,—and £1075 in *Easter* term 1817. The whole profits of the business will, to within ten days of the end of *Easter* term next, be received by the said Mr. *Bozon*, and from that period the whole business to be transferred to Mr. *Farlow*. The payment of the £2075, to be secured by the warrant of attorney of Mr. *Farlow*, to be given at the time of signing this agreement, on which judgment may be immediately entered up; and if Mr. *Bozon* wishes it, Mr. *Farlow* is to give three notes, two for £1000 each, and the other for £1075, payable at the times within mentioned. Mr. *Bozon*, on his part, undertakes that the net profits of his business for the last three years, has been £2000 a year, and upwards. The fixtures of Mr. *Bozon's* office, to be taken by Mr.

1816.
BOZON
v.
FARLOW.

*Farlow* at a fair valuation, and Mr. *Farlow* is to have the option of purchasing the lease of Mr. *Bozon*'s dwelling-house and offices, at the sum he has laid out in the improvements thereof, the same not to exceed £200, and to make his election whether he will take such house on or before *Michaelmas*-day next. From the 1st of *September*, the business to be carried on in the names of *Bozon* and *Farlow*. In case any articled clerk or clerks shall be taken by Mr. *Bozon* alone, or Mr. *Bozon* and Mr. *Farlow* jointly, one third of the premium to be received is to be retained by Mr. *Bozon*, and the remaining two-thirds to be paid to Mr. *Farlow*, it being understood that no clerk is to be taken to board in the house. Mr. *Farlow*, on Mr. *Bozon*'s going out, to take an assignment of the articles, with usual clauses."

At the time of this paper being signed, and for many years previous thereto, the Plaintiff had carried on an extensive business as an attorney at *Plymouth Dock*; and the Bill stated that, being in *London* in the month of *June* 1814, he had, on the 15th of that month, an accidental meeting with the Defendant, who was then an attorney practising in *London*, and who informed him at the time of such meeting that he was desirous of leaving *London* and commencing business in the country, upon which the Plaintiff said that he himself wished to retire from practice; and, if the Defendant chose it, would dispose of his business to him. The Defendant appearing to be pleased with the proposal, a treaty was entered into, and several subsequent meetings took place between them, during which the Plaintiff explained to the Defendant the nature and extent of his business, gave him an opportunity of inspecting the books of his agents in *London*, and proposed to him to go down to *Plymouth* to make further inquiries and examination at his office, but which the

Defendant declined, saying he was well satisfied with the information he had already acquired, and with the Plaintiff's assurance, and offer to undertake, that his business had yielded upwards of £2000 net profit *per annum*, for the three years preceding. The sum proposed to be given and received, by way of premium, was £3000, to which £75 was afterwards added in consequence of a discussion respecting payment of interest, the Plaintiff agreeing to accept this addition in lieu of interest. A discussion also took place respecting the security to be given for payment of the instalments, the Defendant having first offered landed security, but afterwards altering his mind, and prevailing on the Plaintiff to be satisfied, instead of it, with the security expressed in the paper already mentioned. The paper was then signed, the Plaintiff having previously, as the Bill alleged, stated to the Defendant that he had a brother who was then setting up the business of an attorney at *Plymouth Dock*, and that he could not be answerable for the disposition of his clients; but the Defendant said he would take his chance. The Bill then charged that, at the time of signing the paper, it was agreed between the parties that articles of agreement should be regularly drawn up and executed by each of them on the evening of the same day, at the office of the Plaintiff's agents in *London*; that the articles were drawn up accordingly by the Plaintiff's directions, but the Defendant did not attend at the office pursuant to his engagement; and that, though frequently applied to, he had ever since refused to complete the agreement.

The Defendant by his answer admitting the signature of the paper, and the treaty which led to it, insisted that the paper in question was drawn up by the Plaintiff's agent in presence of the Plaintiff and De-

1816.

BOZON v. FARLOW.

fendant, only as the heads of an arrangement intended for the consideration of both parties, and by no means as a conclusive or binding agreement between them, but each to be at liberty to alter or altogether reject them at any time previous to the execution of the articles of agreement which, he admitted, were to be prepared and executed on the same evening, in case the parties should mutually approve of the terms, but not otherwise.

Another ground of defence taken was, that the Plaintiff had made a false representation relative to his brother, who had served his clerkship in his office, and had just then set up in business for himself at *Plymouth Dock* aforesaid, but with whom he stated that he, the Plaintiff, had no intercourse or connection, with the view, as the Defendant believed, of persuading him that he had nothing to apprehend from that quarter, whereas he found, after leaving the Plaintiff, that at that very time the Plaintiff and his brother were residing together at the same hotel on the most friendly footing; in consequence of which discovery he wrote to the Plaintiff for an explanation, but received no answer, which made him refuse to have any further concern in the negociation.

A third ground insisted upon was, that the Plaintiff was entitled to no relief in Equity, inasmuch as all the matters contained in his Bill might be tried and determined at law.

The Plaintiff's brother was examined as a witness on the part of the Defendant, to prove that, although there had been a coolness between them, their disagreement had been made up, and they were on perfectly good terms at the time of the Defendant enter-

1816.

BOZON
v.
FARLOW.

ing into the alleged agreement; that he had, in fact, at that time, obtained promises from several of his brother's clients to transfer their business into his hands; that the Plaintiff had repeatedly advertised for a partner, as being himself about to retire from practice, before his negociation with the Defendant, and had even offered to dispose of the business for a less sum than the Defendant proposed to give for it; and that the business itself was not of a saleable description, as being principally in Common Law and Bankruptcy.

On the other hand, it appeared from the evidence of the *London* agent employed to draw up the paper in question, that the first meeting between the parties at which the Deponent was present took place on the day before that on which the paper was signed; that he then received instructions to draw up the paper, the signature of which was only deferred in consequence of some difficulty as to the security proposed to be given by the Defendant. The evidence then proceeded to confirm the statement in the Bill as to the voluntary communication by the Plaintiff at their subsequent meeting, and previous to the signature of the paper, of the circumstance of his brother having set up in business; and it added, that the Plaintiff also at the same time informed the Defendant that he had before advertised the business for sale, and that it was a business likely to be not so productive in time of peace as it had been during the war. That the Defendant asked the Deponent whether it was not to be apprehended that the brother of the Plaintiff might take away a great part of the business; to which the Deponent replied that there was no answering for the caprice of clients, but he did not think there was much ground of apprehension in that quarter, after the Defendant had been

1816.

Bozon v. Farlow.

properly introduced by the Plaintiff; and that much would depend on his own conduct. That this conversation passed before the Defendant signed the paper, which paper the Deponent firmly believed was intended to be a binding agreement; and that, as the Defendant was to leave *London* the next day, it was determined that regular articles of agreement should be drawn up ready for execution the same evening, upon the terms expressed in that paper. That there was no intimation whatever of the parties being either of them at liberty to recede from those terms, but on the contrary it was plainly expressed and understood that the paper in question was to form the basis of the articles.

Sir *Samuel Romilly*, *Montagu*, and *Pepys* for the Plaintiff.

The first ground of defence relied on against the specific performance of this agreement, is that of unfair practice and misrepresentation on the part of the Plaintiff. As to this, the dates of the several transactions, and the character and situation of the parties, are material. Both were professional persons; therefore, it may be presumed, less likely to be imposed upon than others. The first application proceeded from the Defendant, several days before the final meeting. The arrangement bears every mark of deliberation. The Plaintiff proposes inquiries to be made, which the Defendant declines, as considering them unnecessary for his satisfaction. The terms are agreed upon and settled at the meeting of the 22d; but the paper then drawn up remains unexecuted till the ensuing day, when both parties, after taking all this length of time for consideration, affix their signa-

tures to it. All that remains is the mere unsupported imputation of a fraudulent preference of the Plaintiff's brother.

1816.

Bozon v. Farlow.

Then it is said, this paper was not a final agreement, but mere proposals for an agreement. But they were accepted proposals, and therefore equally binding in a Court of Equity with a more formal instrument. They were signed by both parties, after a full understanding, and with mutual confidence.

With respect to the remedy being only at law, in this case, as a case of personal chattels, though no precise instance can be found of a similar agreement enforced in Equity, yet there are many which come up to it in principle. *Buxton* v. *Lister* (*a*), *Peacock* v. *Peacock* (*b*). The difference between the present case and that last cited is only as to quantity. Here it is the entire interest which is the subject of the contract. There it was only a partnership share: but *Ball* v. *Coggs* (*c*) was not the case of a partnership; and it might just as well have been said, in that case as in this, that the proper remedy was at law. The true principle is, that Equity will relieve in all cases where an agreement is of such a nature that it cannot be substantially carried into effect at law.

Another objection was made to this species of contract in the case of *Bunn* v. *Guy* (*d*), *viz.* on the

(*a*) 3 Atk. 383. Vide Anon. 2 Ves. 629. *Cud* v. *Rutter*, 1 P. W. 570. *Capper* v. *Harris*, Bunb. 135. *Nutbrown* v. *Thornton*, 10 Ves. 161. *Mason* v. *Armitage*, 13 Ves. 37.

(*b*) 16 Ves. 49.

(*c*) 1 Bro. P. C. 296.

(*d*) 4 East 190.

1816.
Bozon
v.
Farlow.

ground of its being contrary to the policy of the law, and to principles of morality and good conscience, to carry such an agreement into execution; it being represented as inconsistent with the duty of an attorney to transfer to another the confidence reposed in him by his clients. But how, if such an objection were to prevail, could an attorney be justified in taking a partner, or even admitting a clerk, into his office? And what is there to distinguish the case of an attorney from other cases, for instance, that of a medical man, in whom the same or a higher species of personal confidence is reposed by his patients?

*Fonblanque*, *Hart*, and *Newland*, for the Defendant.

In *Bunn* v. *Guy* (a), the parties were sent to law, but not till after the *Lord Chancellor* had expressed his great disapprobation of that species of contract, and considerable doubts of its legality. The confidence reposed in an attorney by his clients is not the subject of bargain, not an article which may be transferred from one man to another at pleasure. If it be a part of the policy of the law to prevent the execution of contracts, the effect of which would be to destroy social confidence, this is of that very species of contract. The cases of partnership are widely different from such a case as the present. When an attorney admits another into partnership, it is under the same obligation of secrecy as to the concerns of his clients by which he himself is bound, and his own previous obligation still continues in full force. But here is a transfer attempted to be made to a third person, between whom and the bargainor or his clients there is

(a) 4 East 190.

no obligation whatever, of all the private concerns of those clients.

In all cases, if a party has a legal right he has a legal remedy; and there is nothing in the nature of this contract that calls for a specific performance in Equity.

Besides, the loose and inaccurate character of the instrument is such, that if the agreement were in itself of a nature to be carried into execution, a Court of Equity could not, in this instance, decree a specific performance. In many cases where parties have entered into articles with reference to a more formal instrument hereafter to be executed, although it may be evident that they did not consider those articles as in themselves constituting a binding contract; yet, it appearing that the articles were so entered into upon the faith of a settled mutual understanding, a specific performance has been decreed in this Court, as of an actual agreement. But in such cases the Court has always looked at the terms of the instrument; and, when it has been seen plainly that it was a mere loose and undigested set of proposals, meant to form the basis of a future agreement, but not considered by either party as in itself of the essence of an agreement, the Court has refused to execute it.

The present is clearly a case of that description. One of the heads of these proposals, always referring to a regular instrument (which, it will be remembered, had been directed to be drawn up, and a time for its execution fixed,) is, "The usual clauses to be inserted." What are the "usual clauses" in an agreement like this? An agreement for the sale of the Plaintiff's business as an attorney at *Plymouth*?—

1816.
Bozon
v.
Farlow.

What would be the nature of the clause that should restrain him from setting up business there again at any future period? To how many variations in the understanding of the agreement would this single question give birth? What rule would they have for deciding which was the true understanding of such an agreement? Then, the Plaintiff's undertaking that his business had been upwards of £2000 *per annum*, for the last three years,—what does it amount to, or how can such an undertaking be made the basis of a decree for specific performance?

But, supposing the mutual understanding to be ever so clear and explicit, is this a case in which a specific performance can be decreed?—Is there any instance of its having been decreed when the agreement is such that it cannot be specifically executed without recalling time past? This contract has in fact passed away by the lapse of time. It was an agreement for a partnership from *Michaelmas* 1814 to *Easter* 1815, and for the sole business from that time. This is like a contract for a lease where the term for which it was to have been granted has passed away before a decree can be obtained. The business, which is the thing contracted for, is not the same from 1816 to 1817 that it was from 1814 to 1815. A decree for the specific performance of this agreement would therefore, if it had any operation, give a thing totally different from the thing contracted for.

Equity can give no more than the law would give. The true principle for the interposition of Equity embraces two propositions—first, that the agreement is in itself a binding legal agreement—secondly, that it does not admit of compensation in damages, and is such as cannot be specifically performed at law. This,

on the contrary, is an agreement which, if to be executed at all, can only be executed in the way of compensation.

It is a general rule that Equity will not decree a specific performance in cases of agreements respecting personal chattels: the only decided case of exception to this rule is that of a partnership; and the reason is, that suppose an agreement for a partnership, and that one of the parties afterwards refuses to perform it, the other could have but a very inadequate and doubtful remedy at law. There would be no possible mode of calculating profit and loss, and the damages, if any were recovered, would of necessity be very inconsiderable. But in this case, if an action would lie at all, the relief to be obtained by it would be precisely of the same nature as that which a Court of Equity could give.

The single point that remains is, whether the Plaintiff, supposing it to be a case for specific performance, is entitled to such a decree upon the evidence, which amounts to gross misrepresentation, and to a surprise upon the Defendant, at least, if not to a positive fraud, in respect of the brother's having set up in business.

Sir S. *Romilly* in reply.

This is not the case of a personal chattel, as to which it is said that Equity will not decree a specific performance; nor has it any analogy to that case; the rule being only that this Court will not assist the purchaser of a personal chattel, by giving him the thing contracted for, upon the ground that he may have full compensation in damages. In the present case, on the contrary, the purchaser would be entitled to relief in

1816.

BOZON v. FARLOW.

Equity, because the value of the thing contracted for is not capable of being estimated in damages; and the vendor is consequently entitled to the same remedy, on the ground of mutuality in the contract.

Then as to the objection on the ground of public policy. What is there to distinguish this case from those of similar contracts which are taking place every day in other businesses and professions? In *Bunn* v. *Guy* (a), whatever may be represented to have been the opinion of the *Lord Chancellor*, he did not act upon it, but sent it to a Court of Law to determine whether it was a valid legal agreement.

Next, as to the want of good consideration; it cannot be alleged that it was an agreement without consideration; and, if there was any, what means exist of judging whether it was or was not inadequate?

To the objection, that the paper in question is a paper containing merely proposals for an agreement which were not accepted; the answer is this. Undoubtedly, a more formal instrument was in the contemplation of the parties; but, if these proposals were indeed not accepted, why was the paper signed and attested? Can a professional person, who has thought it necessary to preserve such evidence of his assent to certain propositions, and afterwards thinks fit to retract, saying that it was no agreement, be allowed in Equity to avail himself of such a subterfuge? He calls it a treaty; but in fact it is neither more nor less than the substance of an agreement entered into by two parties after mature deliberation. It is said that terms are necessary to constitute an agreement. Here

(a) 4 East 190.

1816.

Bozon
v.
Farlow.

are the terms of the agreement. The Plaintiff does not seek by his Bill to have any thing inserted that is not to be found in this paper. Take the ordinary case of an agreement for a lease, with "the usual covenants." One of the parties says that he does not know what are the usual covenants. Was this ever alleged as a reason why the Court should refuse a specific performance? The vendor, in this instance, will be required to covenant that his business had produced £2000 a year during a certain period. There is no difficulty in that, provided the fact be so. With regard to all other objections to the loose nature of the instrument in question, it must undoubtedly be referred to the Master, to settle a proper form of deed; and this will sufficiently obviate them.

The charge of fraud and misrepresentation is not borne out by the evidence.

*The* Master *of the* Rolls.

*July* 29.

This is a Bill for the specific performance of an agreement, by which the Plaintiff, an attorney at *Plymouth*, was to give up his business to the Defendant, in consideration of a certain sum of money, to be paid to him by instalments. The Defendant, having repented his bargain, resists the completion of it on several different grounds. My principal doubt, however, has been, whether, supposing all his other objections to be surmounted, this is an agreement which a Court of Equity can carry into execution. The Defendant agrees to give £3075 for the Plaintiff's business, and the Plaintiff agrees that, at a certain period, his business shall be transferred to the Defendant.

1816.

Bozon
v.
Farlow.

Now, the business of an attorney consists in his being employed by others, from the confidence which they repose in his skill and integrity. In what way, then, is the Court to decree the transfer of such a business? What is it that I am to direct Mr. *Bozon* to do towards the fulfilment of his part of the contract? The Court must be able to prescribe to both parties what it is that they are reciprocally to perform. The very ground on which the jurisdiction of a Court of Equity in decreeing a specific performance is founded, is, that it is able to give possession of the very thing which is the subject of the agreement, and which a Court of Law cannot do. But, when I order Mr. *Farlow* to pay his £3075, in what way am I to proceed in order to put him in possession of Mr. *Bozon's* business? What acts am I to direct Mr. *Bozon* himself to perform, in order to effect that purpose?

In the case of *Bunn* v. *Guy* (*a*), there was no occasion to consider whether the agreement could be specifically performed; the only question was, whether there was a legal consideration for the securities that had been actually executed. In that case, however, there were means devised, by which Mr. *Carpenter's* business might have been made to pass into the hands of the other parties; for it was stipulated that he should not, in future, practise as an attorney within 150 miles of *London*; that he should permit his name to be used in the firm for a considerable time after he quitted the business; lastly, and principally, that he should endeavour, by all the means in his power, to influence and induce his clients to become the clients of *Bunn* and *Guy*. The *Lord Chancellor* doubted not only the propriety, but the legality, of some of those con-

(*a*) 4 East 190.

ditions; and, though it was ultimately determined that they were not illegal, I think that he would hardly have decreed them to be specifically executed.

Does the present case furnish any ground upon which I can decree Mr. *Bozon* to perform any of the acts, the performance of which was stipulated in that of *Bunn* v. *Guy*? The only part of the agreement, which seems at all to have a tendency to provide for its completion by introducing the Defendant into the Plaintiff's business, is the stipulation that it shall be carried on in their joint names from the 1st of *September* 1814 till within ten days of the end of *Easter* Term 1815; a stipulation which has never been acted upon, and the period for acting upon which had expired long before the hearing of the cause. The decree which I should have to make would, therefore, be nothing more than an order upon Mr. *Farlow* to pay his purchase money; or, if I were to go any further, and to introduce the words, "upon Mr. *Bozon's* transferring his business to him," I should feel myself greatly at a loss in telling the one party what he is to do, or the other what he is entitled to exact.

It may be said, however, that it constitutes part of the agreement that "the usual clauses" shall be inserted in the instrument to be executed, and, therefore, that, on the basis of that agreement, such clauses might be introduced into it, as would sufficiently provide for the Defendant's security. But it has not been at all suggested what are the clauses which, independently of positive stipulation, belong to an agreement of this sort, as "the usual clauses." We have, in the case of *Bunn* v. *Guy*, an instance of such clauses as have been introduced into an agreement of the same nature with the present. But are they to be consi-

1816.

BOZON
v.
FARLOW.

dered as stipulations so annexed to this sort of transaction as to be introduced, as "the usual clauses," into the instrument which is to be executed on the basis of the present agreement? Is Mr. *Bozon* to be bound, for instance, not to carry on his business of an attorney within 150 miles of *Plymouth*, or within any and what other distance from that place; when it is manifest, from direct evidence in regard to what passed at the time when this agreement was framed, that no such point ever came into discussion between the parties: and when it has been decided, in the case of *Cruttwell* v. *Lye* (a), that, unless restrained by positive contract, a man may, after selling the good will of a trade, set up a business of the same kind, at the same place, whenever he pleases? Then, is Mr. *Bozon*, in order to allure customers, to permit his name to remain in the firm after his concern in the business has entirely ceased? Admitting that it is not illegal so to contract, yet is it a stipulation so extremely proper for a Court of Equity to sanction, that it will introduce it, as of course, into an agreement, the parties to which had never expressed any intention of resorting to it? I apprehend, not; and I should think the same, likewise, of the remaining covenant, which is to influence customers to employ the one party to the agreement because the other party is paid for so influencing and inducing them.

There are no means, therefore, that I can prescribe, by which Mr. *Farlow*, when he has paid his money, is to have any thing secured to him in return for it. I am not called upon to determine whether this is a void agreement; but I think that it is an agreement which a Court of Equity is not able to carry into execution,

(a) 17 Ves. 335.

and that the Bill must be dismissed; but without costs, since it is an agreement which was deliberately entered into on the part of the Defendant.

1816.

BOZON v. FARLOW.

GEORGE MUTTER, Clerk, - - PLAINTIFF,

AND

ARTHUR ROBINSON CHAUVEL, Clerk, ANDREW DENNIS O'KELLY, SIR THOMAS PLUMER, GEORGE WATLINGTON, JOHN SYMONDS, ROBERT CAPPER, ROBERT CLUTTERBUCK, JAMES TENANT, THOMAS NICHOLL, WM. MANNING, JOHN FOX, and the ATTORNEY GENERAL, - - - DEFENDANTS.

July 23, 24.

Plea of Plenarty.*

* *Quære*, if it will hold to a Bill seeking possession of a Donative living?

THE case made by the Plaintiff's Bill was as follows:—

*Sir Lancelot Lake*, seised in fee of the mansion of *Cannons*, and of the impropriate rectory of *Stanmore the Less*, otherwise *Whitchurch*, in the county of *Middlesex*, (which rectory is a donative with cure of souls, whereof the advowson or right of donation was parcel of right belonging thereto,) made his Will, dated the 1st of *April*, 1680, whereby he appointed Dame *Essex Drax* and his son, *Sir Lancelot Lake*, the younger, his Executors, and gave to his said Executors, and their heirs, the tithes of the said impropriate parsonage in trust for certain charitable purposes therein mentioned, and, subject thereto, to be enjoyed by the then incumbent and his successors, and devised to his said Exe-

1816.

Mutter
v.
Chauvel.

cutors and their heirs, the advowson or right of donation of the said rectory.

On the death of the Testator, the mansion of *Cannons* descended to *Lancelot Lake*, the younger, as his heir at law, who dying intestate in 1693, the same descended to his brother, and heir at law, *Sir Warwick Lake*; and, by indenture dated the 2d of *February*, 1693, Dame *Essex Drax*, the surviving Executor, conveyed to Trustees therein named, and their heirs, the said rectory and all the tithes thereto belonging, upon trust for the charitable purposes mentioned in the Will, and, subject thereto, in trust for the then incumbent and his successors; in which indenture was contained a proviso that the Trustees should suffer the said *Warwick Lake*, his heirs and assigns who should be owners of the said mansion of *Cannons*, to nominate, as often as he or they should think fit, a clerk to be incumbent.

Some time previous to the year 1734, *Sir Warwick Lake* conveyed the mansion of *Cannons*, and also his equitable interest in the advowson, to *James*, Duke of *Chandos*, after whose decease the same were, by act of parliament, vested in Trustees for sale, who, by deed of *April* 1753, conveyed the mansion in fee to *Hallett*, and put up the rectory to sale by public auction, when one *Pudsey* was declared the purchaser thereof, for £790, in trust for the Marquis of *Caernarvon*; but, disputes having afterwards arisen respecting the title of the Trustees under the act, on the ground that the advowson was appendant to the site of the mansion of *Cannons*, a Bill was filed for specific performance, and a decree made for a reference to the Master; and before any further proceedings were had thereon, this suit was compromised, it being agreed that *Hallett*

1816.

MUTTER
v.
CHAUVEL.

should be taken as purchaser at the sum aforesaid, to whom and his heirs the rectory was accordingly conveyed by deed of *April* 1763, all parties joining in the conveyance.

The mansion of *Cannons*, after *Hallett's* death, was sold, as the Bill stated, to the ancestor of the Defendant *O'Kelly*, or to some person unknown to the Plaintiff, through whom *O'Kelly* claimed; and the advowson was vested by act of parliament, (among other hereditaments), in Trustees and their heirs, upon trust to sell; and they conveyed the same to the grandson of *Hallett*, who was also Devisee for life under his Will; and who, by indentures dated the 11th and 12th of *October*, 1793, conveyed the said equitable advowson or right of donation, for the sum of £1200, to the Plaintiff's father, by whom the same was afterwards conveyed to the Defendant, *Fox*, his heirs and assigns, upon trust to sell for payment of debts.

The Bill, filed after *July* 1811, proceeded to state that in 1776, *Hallett* nominated and appointed to the said donative church one *Henry Poole*, (since deceased), who continued in possession, as minister of the said church, till his death on the 5th of *December*, 1810, whereupon the same became void; and that, by deed-poll dated the 2d of *May* following, the Plaintiff's father and *Fox* duly appointed the Plaintiff thereto, who in due form of law took the oaths of supremacy and allegiance, and subscribed the thirty-nine articles of religion, and in all other respects conformed to the statutes made in respect to donatives with cure of souls, and thereby became, and then was, justly entitled to the said donative church, and the profits of the said benefice since the 2d of *May* aforesaid.

1816.
MUTTER
v.
CHAUVEL.

That the Trustees under the deed of 1693 had never joined in appointing to the said donative; the said *Warwick Lake* in his lifetime, and the owners in equity for the time being of the said advowson since his death, having always alone appointed thereto; but that *O'Kelly*, claiming, as owner of *Cannons*, to be entitled in equity to the said advowson, had formed a scheme to obtain the beneficial interest therein, in pursuance of which he procured an information to be filed by the *Attorney General*, in the year 1811, against the Defendant *Musgrave*, (in whom the legal estate was vested as representative of the surviving Trustee under the deed of 1693,) for the appointment of new Trustees, on which a decree was obtained by consent, and Trustees accordingly appointed, to whom *Musgrave* afterwards conveyed the advowson upon the subsisting trusts of the said indenture, and who, by the direction, and with the privity of *O'Kelly*, appointed the Defendant *Chauvel* to the said donative, which last named Defendant had, by virtue of that appointment, ever since the said month of *May* 1811, been, and then was, in possession of the said donative, although, at the time he was so appointed, he knew, or was informed, or had notice, of the adverse title.

The Bill further stated, that the Plaintiff's father died leaving the Plaintiff his heir at law, and as such beneficially entitled to the advowson, subject to the trusts of the deed of 1805; and, charging that the conveyance by *Hallett* to the ancestor of *O'Kelly*, did not pass the equitable right to the advowson, but that *Hallett* himself had, in fact, nominated the late incumbent after that conveyance was executed, that he had the right so to nominate, and that so it would appear if the Defendants, *O'Kelly*, and Sir *Thomas Plumer*, (to

whom *O'Kelly* had lately sold the mansion of *Cannons*), would discover their title; and moreover, that the Decree in the *Attorney General* v. *Musgrave* was improperly made, inasmuch as the Plaintiff and *Fox* were no parties to the Bill, and also inasmuch as the same was obtained by collusion; therefore prayed a declaration that the said advowson or right of donation was vested in the Defendants, the Trustees appointed under the said Decree, in trust for *Fox* and his heirs, subject to the trusts of the indenture of 1805, and that the same might be conveyed accordingly; and that it might also be declared that the other hereditaments comprised in the deed of 1693 were vested in the same Trustees, in trust (subject to the said charitable purposes) for the benefit of the Plaintiff and his successors, ministers of the said donative church; and that the Defendant *Chauvel* might be decreed to resign and give up possession thereof to the Plaintiff; and for an account of tithes, &c. and an injunction.

To the relief sought by this Bill, the Defendant *Chauvel* pleaded in bar, "that in the month of *January* 1811, the parish church of *Stanmore the less*, otherwise *Whitchurch*, in the Bill mentioned, which is a donative and ecclesiastical benefice with cure of souls, being then void by the death of the Reverend *Henry Poole*, clerk, the last incumbent thereof, *Andrew Dennis O'Kelly*, then of *Cannons*, Esq., being or pretending to be the patron of the said donative or church, and seised of or well entitled to the advowson, right of patronage and nomination, or appointment of the parson or incumbent of the said church, did in due form of law, and with all the ceremonies of law required in that behalf, nominate and appoint the Defendant, to the said church or living, as the parson and incumbent thereof, by virtue of which nomination and appoint-

1816.

MUTTER v. CHAUVEL.

ment, he the said Defendant, in the month of *May* 1811, took, and hath ever since been in the legal seisin or possession of the said church, and having duly taken the oaths of supremacy and allegiance, and subscribed the thirty-nine articles of religion, and in all other respects conformed himself to the laws and statutes made with respect to donatives with the cure of souls, the said church is, by the means aforesaid, full, and provided for with the Defendant as the lawful parson and incumbent thereof, and was on the day, and at the time of filing the said complainant's Bill, and for six calendar months then next before, which the Defendant is ready to verify," &c.

None of the other Defendants had put in their answers; and, the plea now coming on to be argued, the single question was, whether Plenarty is a good plea in Equity in the case of a donative living.

*Sir Samuel Romilly* and *Horne*, in support of the plea.

The statute, *Westminster the Second* (*a*), which fixed the period of six months as the term of possession to enable an incumbent to plead plenarty to a writ of *quare impedit* or *darrein presentment*, has been held to extend, by analogy, to a Bill in Equity. *Boteler* v. *Allington* (*b*); in which case Lord *Hardwicke*, founding himself on the authority of *Gardiner* v. *Griffiths* (*c*), observed, that the act in question was made for the peace of the church, that it was a very useful law, had been always rigidly adhered to as such, and was very proper to be adopted in equity, under the general rule that equity follows the law (*d*).

(*a*) 13 Edw. 1. st. 1. c. 5.
(*b*) 3 Atk. 453.
(*c*) 2 P. W. 404.
(*d*) 3 Atk. 458.

This, as a general rule, will not be disputed; but the objection which, it is apprehended, will be taken to the plea of this Defendant is, that the living in question is a *donative* rectory, to which the statute does not extend; and this objection will be attempted to be supported by the words of the statute, which are, "cum aliquis jus præsentandi non habens, præsentaverit," &c. upon which it will be said that the word, *præsentaverit*, can apply only to the case of a benefice which is filled, in the ordinary manner, by presentation and induction. However, Lord *Coke's* commentary on these words in the statute gives us the following exposition:—"By this word, *præsentaverit*, it appeareth that no plenarty doth put the patron that hath title to present out of possession, but only plenarty by presentation; but plenarty by collation doth put him that had right to collate out of possession" *(a)*. This is an authority in support of the plea, supposing the case to be within the statute; but if not, it must be recollected how it stood at common law before the statute, according to which plenarty might, at any time, have been pleaded in bar to the patron's claim; the statute being made in favour of the patron, not of the incumbent; and so it appears by *Boswell's* case *(b)*, in which it is said, "plenarty by collation at the common law did put him that had right to collate to his writ of right at the common law. For as plenarty, by presentation, did put him who ought to present out of possession at the common law, *pari ratione et jure*, plenarty by collation put him who ought to collate out of possession. For *eadem lex est ubi eadem est ratio*." So also in *Green's* case *(c)*. "Although plenarty by collation doth not put him who hath title to present, out of possession,

(a) 2 Inst. c. 5. 357.
(b) 6 Rep. 48. b.
(c) 6 Rep. 29, 30.

1816.

MUTTER v. CHAUVEL.

yet plenarty by collation will put him who hath title to collate, out of possession;" which amounts to this, that, to a patron claiming by a title of the same kind as that under which the present incumbent holds, such a plea is at all times available. If, therefore, it is a case not falling within the statute, it stands as at common law; and then possession for six months is not necessary to be pleaded.

The same doctrine is repeated by *Coke* in his first Institute (*a*); and, if it shall be said that one of the reasons assigned for the provision of the common law on this subject; namely, that "the law intends, that the bishop that has cure of souls within his diocese would admit, and institute an able man for the dis-

(*a*) Co. Litt. 344. *a. b.* "At the common law, if an estranger had presented his clerk, and he had been admitted and instituted to a church, whereof any subject had been lawful patron, the patron had no other remedy to recover his advowson, but a writ of right of advowson, wherein the incumbent was not to be removed; and so it was at the common law, if an usurpation had been had upon an infant or feme covert, having an advowson by descent, or upon tenant for life, &c. the infant, feme covert, and he in the reversion were driven to their writ of right of advowson; for at the common law, if the church were once full, the incumbent could not be removed, and plenartie generally was a good plea in a *quare impedit*, or assize of *darraine presentment*; and the reason of this was, to the intent that the incumbent might quietly intend and apply himself to his spiritual charge. And, secondly, The law intended that the bishop that had the cure of souls within his diocese would admit and institute an able man for the discharge of his duty, and his own; and that the bishop would doe right to every patron within his diocese."

charge of the pastoral duty" (*a*); does not apply to a donative, the other and primary reason, *viz.* "That the incumbent might quietly attend and apply himself to his spiritual charge," is equally applicable to both cases. In the present case, therefore, whatever may eventually turn out to be the title as to the advowson, there can be no right to dispossess the existing incumbent.

Another observation remains, which may be of some importance in ascertaining the true construction of the words in the statute. Donatives existed *before* the statute; and a writ of *quare impedit* was the proper remedy for the patron in the case of a donative as much as of a presentative living (*b*). The form of declaration on that writ, which is the same in both cases, will go a great way in explaining the language of the statute: the recital of the statute is also equally applicable to both cases; and the declaration uses only the same word "*præsentaverit.*" It is reasonable to say, therefore, that the statute, in adopting that word, meant to extend it to all cases to which the writ extended, and to use it in every sense in which it was then understood as being to be taken. But the argument which is drawn from the language of the statute is founded on this single word; and, when thus explained, it consequently falls to the ground. If that language be

(*a*) See 4 Burn's Eccl. Law, 38.

(*b*) - - - "for albeit he come in by lay donation, and not by admission or institution, yet his function is spiritual; and, if such a clerk donative be disturbed, the patron shall have a *quare impedit* of this church donative, and the writ shall say, *quod permittat ipsum præsentare ad ecclesiam*, &c. and declare the special matter in his declaration." Co. Litt. 344. *a.*

1816.

MUTTER v. CHAUVEL.

duly attended to, it will appear most improbable that it was intended to exclude the case of donatives from the general operation of the statute (*a*).

*Hart*, *Bell*, and *Shadwell*, for the Plaintiff.

This is not a mere legal question. The Bill states a case of fraud; and, taking the averments in the Bill to be true, as they must be taken until put in issue, a Court of Equity will not allow a Defendant to take advantage of his own wrong. If fraud is not expressly charged by the Bill, it is at least clearly to be inferred. It is stated, and not denied, that the Defendant *Chauvel* had knowledge of the Plaintiff's equitable title. The plea is, consequently, bad in point of form, as not being supported by averments denying this fact.

But, setting aside the point of form, the case of *Boteler* v. *Allington* (*b*), which is the only authority in support of such a plea to a Bill in Equity, is not decisive of the present; Lord *Hardwicke's* opinion only going to this; that a mere *cestuy que trust* shall not be allowed in equity, to disturb a possession under a legal title. Here, Col. *O'Kelly*, under whom the present Defendant claims, had himself no more than the equitable estate.

The main question, however, is, whether, considering the legal nature and constitution of such a benefice as this, plenarty might have been pleaded at common

(*a*) Sect. 4. "And from henceforth writs shall be granted for chapels, prebends, vicarages, hospitals, abbeys, priories, and other houses which be of the advowsons of other men, that have not been used to be granted before," &c.

(*b*) 3 Atk. 453.

law; for it must be admitted that the statute is not meant to extend to any cases to which the rule of law did not previously apply; that rule being, that, where there has been presentation and induction, the church is full of the incumbent so presented and inducted, and the right of the patron is gone for that turn. In opposition to the doctrine supposed to be found in *Boswell's* case, but for which that case in itself is no authority, the judges unanimously resolved, in *Smallwood* v. Bishop of *Coventry* (a), that it was not plenarty within the statute; "for it must be *ex præsentatione, non ex collatione.*"

A donative is quite distinct, in its nature, from an advowson. In the case of an advowson, the patron is only bound to present a fit clerk; and, if he is not presented within six months, the right is gone for that turn, and becomes vested in the bishop. But there can be no lapse of a donative. The patron of a donative has the exclusive right to confer possession, and is bound by law to no limited time. The language of Lord *Coke* (b) is very material as to this; shewing that the patron, although he has no beneficial interest, yet has the absolute property in a donative. The distinction is so radical, that, as he has expressly laid it down, "if the patron of such a church, chantry, chapel, &c. donative, doth once present to the ordinary, and his clerk is admitted and instituted, it is now become

(a) Cro. Eliz. 207. *Sale* v. Bishop of *Coventry*. 1 And. 241, which seems to be the same case.

(b) Co. Litt. 344. a. "A church parochial may be donative, and exempt from all ordinary jurisdiction; and the incumbent may resign to the patron, and not to the ordinary; neither can the ordinary visit, but the patron, by commissioners to be appointed by him," &c.

presentable, and never shall be donative after, and then lapse shall incur to the ordinary, as it shall of other benefices presentable" (*a*). The doctrine in the Year-Books, (38 H. 6. 20: 39 H. 6. 21.) cited by *Brooke* (*b*), is analogous to this; that "*parson imparsonee* cannot plead plenarty *against a stranger patron;* for the pleading is given by the statute of *Westminster*, that the church is full by six months, before the writ purchased, of such a one by the presentation of such a one; which *parson imparsonee* cannot plead, for he is *not in of any presentation*" (*c*); and, accordingly, *Watson* says, "Plenarty by six months *upon an institution*, where the institution is made *upon a presentment*, *is pleadable* by all persons against a common person: yet a plenarty by mere *collation* is not pleadable, but the patron may bring his writ, and remove the *collatee* at any time" (*d*).

In addition to these authorities, we have this remarkable distinction between a donative and presentative benefice; that, where the patron dies during a vacancy, the right of *donation* descends to the heir at law, but the Executor is entitled to *present*. So in *Repington* v. *Tamworth School* (*e*), where the Chief Justice said, "There is no case in the books to exclude the heir of a donative from his turn in this case, and that *a patron of a donative can never be put out of possession by an usurpation.*" In *Rex* v. *Blooer* (*f*), the Court of King's Bench granted a *Mandamus*, to restore the curate of a *donative* chapel, upon the express ground that where there is a temporal right, the Court

(*a*) Co. Litt. 344.
(*b*) Br. Ab. *Plenartie*, pl. 7.
(*c*) 17 Vin. Ab. 339. pl. 4.
(*d*) Compl. Incumb. 505. cap. 26. 17 Vin. Ab. 340. pl. 6.
(*e*) 2 Wils. 150.
(*f*) 2 Burr. 1043.

will assist by way of *Mandamus*, because it is a specific remedy (*a*); and the distinction is thus taken by Lord C. J. *Mansfield*. "A *Mandamus* to restore is the true specific remedy, where a person is wrongfully dispossessed of any office or function which draws after it temporal rights, in all cases where the established course of law has not provided a specific remedy by another form of proceeding; *which is the case with regard to rectories and vicarages*;" that is, with regard to presentative benefices.

In *Anderson's* report of the Bishop of *Coventry's* case (*b*), which is much fuller than that in *Croke* (*c*), another distinction appears to be made by the judges between a donative and presentative benefice, as constituting the reason why the ordinary has no right to collate, as he has to present in case of lapse. And the argument takes it for granted that plenarty is no plea to a donative. "For, if it were otherwise," (it is said), "the bishop might *collate*; and, as soon as he has collated, and put the incumbent in possession, there would be no remedy for the patron, if that matter could be pleaded in bar to his action; and this is not like the case where one is *presented*, &c. for there it is the act of a third person to oust the presentment; that is, of the ordinary, who, in that case, holds the office of Judge; which is the reason why the patron shall be put out of possession by the presentation, admission, and institution, and by plenarty at common law shall be barred. For the bishop is a person by law indifferent between those who claim" (*d*). And, accord-

(*a*) See acc. *Rex* v. *Barker*, 3 Burr. 1265.

(*b*) *Sale* v. Bishop of *Coventry*, 1 And. 141.

(*c*) *Smallwood* v. Bishop of *Coventry*, Cro. Eliz. 207.

(*d*) "Et pur ceo n'est reason que tiel collation ou done

1816.
MUTTER
v.
CHAUVEL.

ingly, in *Quarles* v. *Fayrchild* (*a*), (the case referred to by *Coke* (*b*), where he says, "a presentation to a donative by a stranger, and admission and institution thereupon, is nearly void; and all this was resolved by the Court of *King's Bench* for the rectory parochial donative of Saint *Burian* in the county of *Cornwall*;") consultation was granted, "because the Defendant claimed nothing but induction, which cannot any way be prejudicial to the Plaintiff. For, if it be a *donative*, the *induction* is to no purpose; and, if it be *presentative*, the other can have no remedy for the profits until induction, nor try his right; and therefore no reason to prohibit it."

This shews that, in the case of a donative, induction confers nothing, but is a mere superlative act. See also *Powell* v. *Milburn*, (the case of the advowson of *Chester-le-street*, (*c*).)

If then, as is said in *Repington* v. *Tamworth School* (*d*), and as appears to follow from this doctrine, "a patron of a donative can never be put out of possession by an usurpation," it is unnecessary, for *his* protection, that the statute of *Westminster* 2d. should have passed; that statute being expressly framed to save, during a period of six months only, a right which, at common law, would have been wholly lost from the moment of induction at the presentation of a stranger.

After all that has been said, no case whatever has

seulement, sans aucun autre matter, peut prejudicer le Plaintiff," &c. 1 And. 243.

(*a*) Cro. Eliz. 653.

(*b*) Co. Litt. 344. *a*.

(*c*) 3 Wils. 355, 365.

(*d*) 2 Wils. 151.

been, or can be, cited, in which this plea has been used in, or held to be applicable to, the case of a donative.

*Sir S. Romilly* in reply.

The objection to the form of the plea does not hold good; the Bill not being grounded in fraud, but charging only that the Defendant *Chauvel* is in possession by virtue of an appointment made by the Trustees in or after *May*, on which the plea takes issue, averring that he is in possession, not under that appointment, but by a title derived from Col. *O'Kelly* in the *January* preceding, thus putting the question on title or no title.

But, supposing the plea were wrong in form, it may be amended, and the question will still be left to depend upon the merits; whether, under the statute of *Westminster the Second*, a person who is incumbent of a donative living may not be protected by any length of time whatever; so that even a possession of 59 years would not operate as a bar in his favour? Donatives are known to the common law. They have at all times existed. Then, what a strange anomaly would it be, both in the common and statute law, if, considering that public policy required a possession, at first of a single hour, and afterwards of six months, to operate as a bar to any adverse title, they had prescribed such a limitation to all advowsons excepting donatives?

We require no cases for our support, resting upon the positive terms of a statute, which, it is for them to shew, does not extend to our case. The fourth section of the Act makes it plain that it was intended

1816.
MUTTER
v.
CHAUVEL.

as a remedial law in the fullest extent; and, with regard to the word *præsentaverit*, it is a complete answer to the argument drawn from its adoption in the statute, that it is used in the forms of pleading in the case of a donative (*a*).

The word *collate* is not used in the limited sense to which it is endeavoured to restrict it. *Sir Simon Degge* (*b*) says, "A donative is a spiritual preferment in the church, which is in the free gift *or collation* of the patron, without making any presentation to the Bishop." Where is it laid down that Institution is necessary to plenarty under the statute? All the authorities cited to this effect refer to the case of a presentative living, and the argument which is attempted to be drawn from them is merely founded on words, disregarding the substance. Nomination supersedes the necessity of Institution, and is equivalent to Collation.

(*a*) Degge's Parson's Counsellor, Part I. c. 13. p. 205. See Fitz. Nat. Brev. 34. g. 35. e. f. Rastall's Entries, 499. a. "Quare impedit de Chauntery," &c. Quod permittat ipsum *præsentare* idoneam personam ad Cantar. ad altar. Be. M. de H. quæ vacat, et ad suam spectat *donationem*," &c.

(*b*) Pars. Counsell. Part I. c. 13. p. 204. And again, "Note, that a parish church may be a donative, and have cure of souls: and such donatives cannot lapse, unless by special agreement at the foundation, *but the ordinary may compel the patron to collate.* But the patron cannot *collate* a layman, as some have thought, but a spiritual person in holy orders; but if the patron once present to a donative, and the Clerk, upon such presentation, be admitted, instituted and inducted, it is thereby for ever become presentative, and shall be no longer esteemed or used as a donative." &c. See also *Fairchild* v. *Gaire*, Yelv. 60, 61.

*The* Lord Chancellor.

[Does it not imply induction also? The words used in nomination are, "I do hereby induct."]

The public inconvenience which gave occasion to the statute, is greater in the case of a donative than of a presentative living. In the latter case, if the patron does not present within a limited time, the presentation lapses to the Bishop, and so the church cannot long be left vacant. But there is no lapse in the case of a donative; and for that very reason it becomes the more necessary to protect the present incumbent.

There is no pretence for treating this as private property, it being a donative to the parish church of *Stanmore*. It is a mere fallacy to imagine that Lord *Coke* supports such a position. The case of *Tamworth School* (a) turns wholly on the question whether, the church having become void during the lifetime of the ancestor, the presentation fell on the heir or the personal representative; and, with regard to the expression relied upon as having fallen from the Court, if it is accurately stated, it amounts to no more than a mere extra-judicial opinion of little weight. In the passage produced from *Viner*'s Abridgement, where it is cited from *Brooke*, who again cites the Year-books, the term "parson imparsonee" can mean nothing else but a person having a complete title as incumbent, whether by collation or by presentation and induction; and it seems, from the note subjoined, to refer to the case of an impropriation. But it is much too obscure to be of any avail whatever.

(a) 2 Wils. 150.

1816.

MUTTER *v.* CHAUVEL.

*The* LORD CHANCELLOR.

This is a very singular case. The Plaintiff represents, that on the 2d of *May*, 1811, he was duly nominated, by virtue of a deed-poll of that date, by persons having an equitable title. The Defendant contends that the nomination made of him by a mere stranger is, after six months' possession, as good as if made by a person having either a legal or equitable right.

This question is to be determined by going back to the time when the statute of *Westminster the Second* did not exist, and considering what was the effect, at common law, of nomination to a donative. If nomination, *ipso facto*, confers possession, then it is obvious that there is not the same guard, in the case of a donative, which the law imposes on the patron in respect of presentative livings.

The Bill does not charge fraud; it only states that an information was filed to have the trust filled up; the appointment of Trustees in consequence; and the nomination of the Defendant *Chauvel*, in *May* 1811, by the new Trustees, with the privity of *O'Kelly*. The plea says, on the contrary, that his appointment took place in the *January* preceding, on the nomination of *O'Kelly* alone, and that he has been in possession ever since; that is, for a period of more than six months before the Bill was filed.

The case of *Boteler* v. *Allington* (*a*), of which I have seen a MS note, was that of a presentation to a presentative benefice; and, the suit having been com-

(*a*) 3 Atk. 453.

menced, not till after the six months had elapsed, the legal right was clear of all doubt. But the *Attorney General* contended, and with great weight, that *Allington* (who was father or uncle of the person whom he presented) being himself a Trustee, and the son or nephew knowing him to be so at the time of so being presented, notice of the trust would affect equally the consciences of both. Lord *Hardwicke* seemed at first to be much struck with the force of this argument, but said that the party presented might have had notice of the trust, without having notice that it was inconsistent with the duty of the Trustee to have presented him. This, it must be acknowledged, was going very near, in point of Equity.

However, I take his decree in that case to have gone upon this principle. Until the statute, let the wrong have been ever so great, the party injured had not an hour after the church was full; for that it was for the peace of the church that there should be no disturbing a presentation once made, and the private injury must yield to the public convenience. Then came the statute, limiting the period at six months, within which it should be lawful for the party wronged to prosecute his remedy. Lord *Hardwicke*'s opinion, therefore, was that the same principle applied in a case of breach of trust; and he put to himself this difficulty. If I interfere on equitable grounds, at any period after the time is expired which the statute has provided for the peace of the church, why should I not interfere at the end of forty or fifty years? Where is to be the limit? And he then supported himself on *Gardiner* v. *Griffiths* (a), where the House of Lords had determined that, if a mortgagee presents, although

(a) 2 P. Wms. 404.

1816.
MUTTER v. CHAUVEL.

he is in some sense guilty of a breach of trust in so doing, yet they would not disturb the presentation after the lapse of the statutable period.

In that case, all that Lord *Hardwicke* had to do was to decide, with a full knowledge of what would be the law on the subject, how far the legal doctrine should be extended to an equitable case. But my difficulty, in the present instance, is of a very different nature; for I have no authority to direct me to a knowledge of what would be the decision of a court of law in the case before me. It is my duty, however, to know what the law is, before I dispose of it. The point is of far too much importance not to put it in the way of having a legal decision respecting it. Whatever may be my opinion, (and I have no hesitation in saying that I have formed an opinion) on the subject, it is not for me to settle the law, which I am bound to follow.

Either an issue, or a case, must therefore be directed, or I must have the matter re-argued before me with the assistance of some of the Judges.

1816.

## THE ATTORNEY GENERAL v. THE BREWERS' COMPANY.

Rolls, *August.*

Devise to a Corporation, upon trust, "from time to time yearly for ever," to lay out the yearly rents and profits in the repairs of a road "at their discretions." Upon an information against the Corporation, at the relation of the Trustees of the road under a turnpike act, an account was directed *from the time of passing the act.* No analogy, in cases of trust, to the statute of limitations.

EDWARD HARVEST, Citizen and Brewer, by his Will dated the 21st of *Feb.* 1610, devised certain closes or parcels of meadow land in *Islington*, to the Master, Wardens, and Commonalty of the art or mystery of Brewers, of the city of *London*, and their successors for ever, upon the following trusts:—"To the sole intent and purpose that the said Master, Wardens, and Commonalty, and their successors, shall, from time to time yearly for ever employ, disburse, and bestow all and singular the rents, issues, revenues, and profits, (which I will and require to be improved to the best value,) yearly coming, growing, and renewing of, or by, the said premises, (forty shillings thereof yearly only excepted), to and upon the repairing and amending the highway between *Tyburne* and *Edgeworth*, in the county of *Middlesex*, from time to time, yearly for ever, by and at the best discretions of the said Master and Wardens, whose pains in a matter of this quality and kind I do heartily pray and intreat; and I do hereby give, devise, and bequeath the said excepted forty shillings yearly to the said Master and Wardens, and their successors for the time being yearly for ever, for their pains in this behalf to be taken."

By an act of parliament, 19th Geo. III. (continued by another act of the 39th Geo. III.) "for repairing the road from *Kilburn Bridge, in Middlesex*, to *Sparrow's Herne*, in *Hertfordshire*," (comprising a part of the line of road described in the Will of *Edward Har-*

1816.

The Attorney General v. The Brewers' Company.

*test)*, among various powers vested in the Trustees thereby appointed, it was enacted that "all lands, tenements, and hereditaments, and all rents, &c. issuing out of any lands, tenements, and hereditaments, which then were, or thereafter should be, liable to the repairs of the said road, and all owners and occupiers thereof, &c., should remain liable and chargeable to and with the repairs thereof, as they were before the passing the said act;" and the proprietors of such lands were thereby required "to pay such sum or sums of money as should be liable to be paid out of, or chargeable upon such lands, &c. as aforesaid, to such person or persons as the said Trustees, or any five of them, should appoint to receive the same; and, upon default of payment, the same should be levied and received in such manner as the penalties and forfeitures imposed by the said act were thereinafter directed to be levied and received."

The information, at the relation of the Trustees under the act, prayed, as against the Defendants, the Master, Warden, and Commonalty of the Brewers' Company, "an account of rents and profits possessed or received by them, or by any other person or persons by their order, or for their use;" the relators offering to account for all sums from time to time paid to them as such Trustees by the Defendants.

It appeared by the answer of these Defendants, that their predecessors, the Master, &c. of the Brewers' Company, entered into possession of the devised premises immediately on the death of the Testator, and had ever since continued in receipt of the rents and profits, which then amounted to the sum of £148. 10*s*. *per ann.*: it was also stated, that they had at different

1816.
The ATTORNEY GENERAL v. The BREWERS' COMPANY.

times paid to the Trustees of the roads divers sums of money out of the rents and profits, the particulars of which were stated in their accounts.

It appeared that it had been usual for the relators and their predecessors, as Trustees of the Road, to apply to the Brewers' Company whenever the roads were in want of repair, upon which the latter always advanced such sums as were necessary to put them in good condition.

By the Decree made on the hearing of this cause, on the 22d of *June*, 1811, it was referred to the Master to inquire at what time the said Defendants were applied to by or on behalf of the Relators for an account of the rents and profits of the said premises, and it was ordered that the Master should take an account of such rents and profits received by the Defendants, or by any other person or persons by their order or for their use, from the time at which he should find the said Defendants were so applied to (*a*).

From this Decree the Relators now presented a petitioning of rehearing, representing that the decree was erroneous, inasmuch as it confined the account to be taken as aforesaid, to the time when the Master should find that the Defendants were applied to on behalf of the Relators; and inasmuch as it directed an inquiry at what time such application was made.

On the rehearing, it was insisted by *Hart* and *Heald*, on the part of the petitioners, that the account ought to be taken from the time of the company having entered into possession, in 1611.

(*a*) Reg. Lib. A. 1 181. b.

1816.

The Attorney General v. The Brewers' Company.

On the other hand, *Sir Samuel Romilly* and *Agar*-*well*, for the Defendants, argued that it should be taken by analogy to the statute of Limitations, for six years only before the filing of the Bill (*a*); insisting, however, that, at all events, the Trustees could not be entitled to any account previous to the passing of the act from which their title was derived.

*The* Master *of the* Rolls

Said, that it was a point which had never yet been decided, from what period a corporate body should be obliged to account in matters of trust; but that the original decree was clearly wrong, as no Trustee can be held competent to say he will account only from the time at which a demand is made; and that to give the account only for six years, would be to create an analogy between a trust account and a common account. That in the present case, previous to the passing of the acts, the Company were bound to apply the rents and profits of the estates without being called upon to do so, and the *Attorney General* might at any time have sued them for that purpose; but, when the act was passed, it was not meant to have a retrospective operation. The Trustees under that act could not say they had a right to the accumulated fund, from any antecedent period; and the *Attorney General*, suing at the relation of those Trustees, could have only such an account as the Trustees would themselves be entitled to.

The account of the rents and profits was therefore directed to be taken "from the usual day of payment

(*a*) 2 Eq. Ab. pl. 21. n. Bridgm. Duke's Ch. Us. 689. *Wych* v. *E. I. Company.* 3 P. Wms. 309.

of such rents, next after passing the act of 19 Geo. III. to this time" (a).

1816.

The ATTORNEY GENERAL v. The BREWERS' COMPANY.

(a) Reg. Lib. A. 1685. b.

## TAGGART v. HEWLETT (a).

Aug. 3.

Letters set forth by the Bill, and not admitted by the Answer, allowed to be verified by Affidavit in support of an injunction.

AN injunction had been obtained, before answer, to stay proceedings at law upon a promissory note given by the Plaintiff to the Defendant's Testator. On the coming in of the answer, the Defendant obtained the usual order *nisi*, and the Plaintiff now shewed cause on the merits against dissolving the injunction, relying for cause principally on certain letters set forth in the Bill, and therein stated to have been written by the Testator to the Plaintiff, which letters were neither admitted nor denied by the answer, the Defendant alleging that he knew nothing about them, and which the Plaintiff now claimed the liberty of verifying by affidavit, and reading in support of the injunction.

*Sir Samuel Romilly* and *Simpkinson*, in support of the injunction.

*Heald* and *Spence*, for the Defendant.

*The Lord* CHANCELLOR

Said that, according to the old practice, the Plaintiff

(a) Ex Relatione

1816.

TAGGART v. HEWLETT.

might have left these letters with his clerk in Court, and have called on the Defendant by his Bill to inspect them before he put in his answer, and then to say whether they were of the Testator's handwriting or not; but, that the modern practice was to allow documents of this sort to be verified.

The Injunction was accordingly continued, upon the Plaintiff verifying these letters by his affidavit, and upon his paying into Court the amount of the note, and of the costs of the action; which was ordered under the particular circumstances of the case.

---

[In the argument in *Whalley* v. *Whalley* (*a*), the counsel for the Plaintiffs cited a case of *Oliver* v. *Daniel*, at the Rolls, *May* 16, 1814, of which the following note has been communicated to the Reporter since the principal case was printed off.]

---

ROLLS, *May* 16, 1814.

"By Indenture dated the 8th of *March*, 1782, the Rev. *William Barker Daniel*, in consideration of £910, granted to captain *William Johnstone* an annuity of £130, for the life of *Daniel*, secured upon his life interest in a sum of £4550. 3*s*. 10*d*., South Sea annuities, the annual dividends whereof amounted to £136. 10*s*.

"This grant, for want of being duly memorialized, was void under the annuity act. Neither party,

(*a*) Ante, p. 436. See p. 413.

however, suspected the invalidity of the instrument, and by deed-poll indorsed on the former deed, and bearing date the 10th of *Feb.* 1787, reciting that *Daniel* had been offered an advanced price for the annuity, to the amount of £1150, and had thereupon applied to *Johnstone* to redeem the same, but that *Johnstone* being desirous of continuing the proprietor of the annuity at such advanced price, had agreed to make up to *Daniel* the difference, 'and had also offered to give to *Daniel* the sum of £55. 5*s.* as and for the purchase of the additional dividends of £6. 10*s.* upon the said South Sea annuities, so that he the said *Johnstone* might be entitled to have and receive the whole dividends and interest, and the annual proceeds thereof, during the life of *Daniel*,' it was witnessed that in consideration of the £910 before advanced, and of £245. 5*s.*, and £55. 5*s.* making altogether £1205, so agreed to be given by *Johnstone*, 'for the purchase of the whole of the dividends, interest and annual proceeds of the said South Sea annuities during the life,' &c.; *Daniel* bargained, sold, and released to *Johnstone*, his Executors, &c., all the dividends and interest of the said South Sea annuities, and every part thereof, &c. and all right, title, &c. both at law and in equity, of him the said *Daniel* in and to the same; to have, and to hold, &c. for his the said *Johnstone's* own use and benefit.

"The Bill, filed by assignees of *Johnstone*, prayed that the Plaintiffs might be decreed to be absolutely entitled to the dividends, &c. of the said South Sea annuities during the life of *Daniel*. The Defendant, on the contrary, alleged that the deed-poll was not to be considered as being an absolute sale or assignment of his interest therein, but as being only a continuation of the original annuity of £130, with a further annuity of £6. 10*s.* during the life of the Defendant,

"It was admitted on both sides, that the deed-poll alone was to be looked to as containing the agreement between the parties; and for the Plaintiff it was contended that the instrument itself being equivocal, the recital must be explained by the operative part.

"But the Court held on the contrary, that the recital must be taken to controul the operative part of the instrument; that as far, therefore, as related to the original annuity, it was void for the defect above mentioned, but was good as an absolute sale of the additional dividends for the sum of £55. 5s.

"The Bill was dismissed, but without costs."

*Hart* and *Wakefield*, for the Plaintiffs.

Sir *Samuel Romilly* and *Barber*, for the Defendant

## WALKER *v.* WALKER.

Before the High Court of Delegates.

Judges Delegates:
- SIR NASH GROSE, J. K. B.
- SIR GILES ROOKE, J. C. P.
- WM. BATTINE, LL. D.
- MAURICE SWABEY, LL. D.
- JOHN HEATH, Esq. J. C. P.
- JOHN FISHER, LL. D.
- JAS. HEN. ARNOLD, LL. D.
- CHAS. COOTE, LL. D.

WM. WALKER, Esq. and HARRIET MARY WALKER, Spinster - - - - - Appellants.
SAM. WALKER and MARY WALKER - - - . Respondents (*a*).

*Feb.* 14—19, 1805.

Where a Testatrix made her Will, disposing of real and personal property, and signed and sealed it; and a clause of attestation in the common form was subjoined, but to which there was no subscription of witnesses; and where the Will was found at her death, wrapped in an envelope, on which was written, "I signed and sealed my Will to have it ready to be witnessed the first opportunity I could get proper persons:" held that the instrument appearing to be incomplete (something more having been intended) was not a good Will as to the *personal* property. But Parol Evidence admitted as to the circumstances of the papers, and as to the Testatrix's intention.

THE case arose on the supposed Will of *Ann Walker*, dated the 8th of *Sept.* 1789, by which she had devised to the Appellants both real and personal estate, and appointed them Executors.

(*a*) This case is referred to by Mr. *Sugden*, in his "Law of Vendors and Purchasers," p. 77. n.

WALKER
*v.*
WALKER.

The Testatrix died 14th of *Oct.* 1801. At her death, she had not any relations nearer than second cousins, in which degree it was alleged that the Respondents stood.

After her death, there were found in her house, besides the said supposed Will, four other papers. one was Testamentary, dated 8th of *Sept.* 1777, and was nearly similar to the one in question, the three other papers were directions concerning her funeral and other matters, and one was an enumeration of treasure, which to a large amount was also found in the house. In the same paper there was a reference: "in the upper drawer of my bureau will be found my Will;" and in another of the papers there was inserted a note, "that none of her cloaths, nor any thing, was to be given to her late servant, *John Walker's* daughter-in-law, nor any of his family." The respondents were brother and sister of this *John Walker.* All the papers were entirely in her own handwriting.

The state of the two *testamentary* papers, (as to their execution,) was this:—As to that of 1777, (which is only material as having been introduced in argument), it had had a signature and seal, and a clause of attestation, but was not subscribed by any witness; the seal had been cut off, and from the state of the bottom of the paper it was doubtful whether some part had not been torn off. The testamentary paper in question, (dated in 1789,) was also signed and sealed; and had this clause of attestation "signed, published, and declared, by me the said *Testator*, to be my last Will in the presence of *us* who attested the same in the presence of each other." *But to this also there was no subscribing witness.* It was found rolled up in a piece of coarse paper, on which the deceased had written,

"I sealed and signed my Will to have it ready to be witnessed the first opportunity I could get proper persons for it."—The Will contained the usual clause revoking all former Wills.

After the death of the deceased, a caveat was entered in the Prerogative Court against the Will of 1789: and after a decree in that Court against the Will, the case came by appeal before the Court of Delegates; and having been regularly assigned, it came on for information and sentence before the whole Commission on the 12th of *July*, 1803; when the Delegates pronounced for the appeal as a grievance, and to admit the whole of the allegation and exhibits, and to retain the principal cause.

The scripts produced were the supposed Will, and the other papers found in the house after Mrs. *W.*'s death.—The exhibits consisted of letters, which had been written by the deceased to the Executors, tending to shew her great partiality for them; and the envelope in which the Will was found.—The material allegations, besides the facts before stated, and other consequent positions, were (on the part of the Appellants,) the great love and regard which the deceased had always borne them, although her parsimonious disposition and recluse habits of life prevented her shewing it in any liberal way; that the Testatrix had in her possession the Will of her late uncle, (*William Walker,*) which was circumstanced, as to the attestation, just as her own appeared to be; that, from her manner of life, she never had an opportunity of procuring witnesses to her Will; her frequent declarations, especially to *Susanna Fry*, her servant, that "she had made her Will, in her own handwriting, but that no person knew the contents of it, but that

WALKER v. WALKER.

such Will would be found a good one after death;" &c. The Respondents, on the other hand, repelled the allegations as to the affection of the deceased for the Appellants, by contrary evidence, that the principal object of her affection was her cousin, *John Walker*, deceased, (the brother of the respondents); they also alleged that she had in her possession *only a rough draft* of the Will of her late uncle, *William Walker*, and that it could not be said she copied from that, as there were also in her possession three other drafts of a Will, or Wills, of the said *William Walker*, and also two probates of Wills, one of another *William Walker*, an ancestor of hers, and the other of her father, *John Walker*, the former of which, *purporting to dispose of personal property only*, was attested by two witnesses, and the latter purported to dispose *of real and personal* property, and had three witnesses. [The fact was afterwards stated to be that this last mentioned Will had *only one* witness.] That the deceased did not live so reclusely as was alleged by the Appellants; and that she could not have thought the Will in question a good one, as she entertained an opinion that witnesses were necessary to all Wills, which was evidenced (among other circumstances) by a conversation stated to have taken place a short time after the death of her cousin, *John Walker*, when she told his widow that the Will of the said *John Walker* was not good to pass real estate, as it was necessary there should be three witnesses to a Will to pass land, and two to pass personal property.

There were six witnesses examined on the part of the Appellants, and twenty-five on the part of the Respondents.

On the 14th of *Feb.* 1805, the cause came on for

argument; when it was contended, on the part of the Appellants, that the Will was good to pass the personal property; and on the part of the Respondents, that it was substantially incomplete, and not sufficient to pass either real or personal estate.

Mr. *Romilly*, Dr. *Lawrence*, and Dr. *Robinson*, for the Appellants.

The great question is, Whether an instrument having all forms necessary for rendering it a valid Will of personal estate, and having something more, applicable only to real estate, is, inasmuch as it purports to affect *real and personal* estate, to be considered as imperfect with respect to the personal, because it is not complete as to the real.

The Will in question is in itself a complete disposition; it has also received all the sanctions, which are required to give it effect. No difficulty can arise on the ground of its giving the personal to one party, to balance the gift of the real to another, shewing one intention to pass both, or neither. On the contrary, both properties are given to the Appellants. There is proof of the Testatrix's capacity, and of her testamentary intentions, which is strengthened by the circumstance that the Appellants are not nearer of kin to her than the Respondents.

The cases on the subject have fluctuated for near a century; at first, it was considered that the validity or invalidity of Wills, circumstanced as the present, was matter of evidence. The case of *Cobbold* v. *Baas* (a) decided positively in favour of such a Will, as a dis-

(a) 4 Vez. p. 200, *in notis*.

WALKER
*v.*
WALKER.

position of personalty, which reduces it to a mere question of fact. The cases, and doctrine, since that time, have brought it back to a question of evidence. In all cases of imperfect Wills, evidence is now required. *Matthews* v. *Warner* (a). But where there is only a presumption that something more *is intended* to be done, much less evidence is required than in the case of a positive imperfection, as, for instance, a Will ending in the middle of a sentence. The want of Executors, or of a residuary bequest; the circumstance that only legacies are given; a deficiency of signature; are instances of presumptions of further intention; but the case of the present Will requires much less evidence than any of these

But if it be necessary to resort to external evidence, the strongest is, where it appears that the instrument was designed by the party as a testamentary disposition; where the persons who are the objects of bounty are ascertained and acknowledged for many years; where the imperfect instrument is under the party's own hand, and is in his custody at his death; and still more where it has been expressly recognized, especially in writings under the Testator's hand found among papers of value. The habits of life too of the deceased may be admitted as some evidence. Where all these unite, no doubt can remain.

1. As to the intention of the deceased in the present case to die testate. The papers found are not like common testamentary papers. They are in themselves complete. Her anxiety about her body, which appears in that paper, by which she gives directions about her tomb, and in the testamentary papers themselves, is a

(a) 4 Vez. p. 186.

strong ground of intention. It is in evidence, that she said no one ought to die intestate; one witness deposes that she said she should make her Will in her own hand, and keep it in her own possession, and that many persons would be disappointed at her death. But she not only intended to die testate, but intended the paper in question as her Will, which is strongly manifested by the paper itself, so far at least as concerns her personal estate, for if her idea of signing and sealing a Will was, not that it would give it any effect, but that it was a mere form, it must be allowed that she would have thought no better of attestation, and then she would have done both at the same time. It is also a material fact that the law was, at the time she made this Will, in favour of the partial validity of such an instrument.

2. As to the affection of the deceased for the Appellants; and first, her testamentary affection. This is most evident from the several papers produced from the year 1777, the date of the first Will, up to within two years of her death; for the paper in which she directs that none of her clothes should be given to the daughters-in-law, or family of *John Walker*, is strong to shew a continuance of her affection, and must have been written since *John's* death, which was not more than two years before her own. Besides, all these papers were evidently intended for her Executors.

3. This Will is admitted to be written throughout in the Testatrix's own hand; it was found after her death in her bureau amongst other papers of value. But it was not laid by and forgotten; but was expressly and repeatedly recognized by her, and referred to as her Will. In one of the papers produced she refers to the very drawer where this was found, and calls

WALKER
*v.*
WALKER.

it "her Will;" suppose this paper had been on the Will instead of the envelope, it must have been decisive. She frequently said she had made her Will, that it would be found good at her death, and that many persons would be disappointed. But it is alleged that she could not by such expressions refer to the paper in question, because she thought that a Will to dispose of personal property required two witnesses, as much as one of real estates did three, having expressly so declared in the conversation with *John Walker's* widow respecting his Will. But as that Will disposed of real property only, it was not necessary that she should have expressed her opinion as to Wills of personal property only; besides, there is a material variation in the depositions of the witnesses. One says her expression was that two witnesses would do for personalty; another that two witnesses would not do for land, though it would for personal property. At another time, being told that *John Walker* had signed his Will, she said there were not witnesses sufficient. It might therefore be as well inferred that she thought three witnesses necessary in all cases, as that she thought two necessary for personal estate. But, it is admitted that she knew the distinction: when, therefore, she recognized her Will as being good, she must have meant good for the disposal of her personalty. It is true, in one instance she coupled this declaration with one respecting her lands; when she was told that her Will had been proved bad, and that *William Walker* would have her lands, she replied, that no one's Will could be proved till they were dead, and that *William Walker* would not have her lands; one witness says, "nor any thing that I have got, nor no one belonging to him." She used to say *William Walker* was of the half blood; her declaration must therefore be taken *generally*, that he would be ex-

cluded by law; but if taken otherwise, it is decisive in favour of her Will. How can her ideas as to land affect this Will as a disposition of *personal* property? Even if she had expressly declared it was good for both estates, the declaration could not be taken that she meant it to operate against the law, and must therefore be referred to the personalty only. The identity of this paper cannot be doubted; no objection, therefore, can arise but from technical difficulties. Wills as to their identity have been easily established, as in a late case on Mr. *Hurdis's* Will, where it was admitted on the evidence of its having been read over to his sister.

A very material circumstance is, that in this paper she has inserted a clause revoking all former Wills. Now, it is clear she had never made any former Will, but that of 1777, and that is circumstanced exactly as the Will in question; by revoking this, she must have thought it a valid instrument, and if so, she must have thought the paper of 1789 so too.

4. The mode of life of the deceased is sufficient to account for the deficiency of the Will in question. She was in the habit of procrastinating every thing (notwithstanding her declarations to the contrary); she never went out, nor had, at a time, three persons with her, except her servants, and the Respondents, and some other persons, all of whom were her inferiors; and these it is evident she would not choose to be witnesses to her Will, which is much strengthened by her mentioning in the envelope, "proper witnesses."

There is, therefore, abundant evidence to support this paper as a Will of personal property; and the de-

WALKER v. WALKER.

fect being only applicable to real estate, it must, on the principle of "*reddendo singula singulis*," be referred to such property, and the Will declared a good disposition of the Testatrix's personalty.

---

Feb. 15—19.

Mr. *Plumer*, Dr. *Adams*, and another Civilian, for the Respondents.

The *Onus Probandi* is on the Appellants; for, the Respondents are the next of kin to the deceased, and as such undoubtedly entitled, if the Will fails.

Two grounds have been taken for the establishment of the Will: first, That it is in itself good, and that the subject of it being mixed accounts for the imperfection appearing on the face of it. Secondly, That if this is not sufficient, the external evidence adduced will support it. The Appellants have relied principally on the first ground, contending that the law inclines to give such an instrument validity, on the maxim of "reddendo singula singulis," and the authority of *Cobbold* v. *Baas*. If this be so, every Will may receive an easy decision; but this principle has been repeatedly denied, and the contrary is the daily practice (a). The Appellants, too, themselves in effect deny the principle and authority: the case relied on is an insulated one. It is admitted, however, that the law has fluctuated: yet it is contended that the law being so understood *at the time*, must have operated on this Testatrix. But it is not to be presumed that the party

(a) *Griffin* v. *Griffin*, decided in 1710. See 4 Ves. Jun. 197 *in notis*. And see *Munro* v. *Coutts*, before the House of Lords, 1 Dow 437.

knew the law; for instance (*a*), Mr. *Baron Perrin's* Will has been lately rejected under circumstances very similar to those of the case in question, which shews that Wills are not to be considered good *pro tanto*, as a general rule. There are abundant cases to shew that the Court below feels it cannot get rid of the clause of attestation. The case of *Painter* v. *Painter* in 1802, arose on a Will *of real and personal* property made by an attorney, but written by the Testator with his own hand; it was signed and sealed, had a clause of attestation, but no witnesses; it was kept locked up with other papers of moment; and the Testator had frequently declared he should leave a Will, and that he meant the same should operate upon his personal property. He died suddenly, and this Will has been pronounced against. Another case is *Stokes* v. *Perry*, decided in 1799. *Mary Collett* made a Will of *real and personal* property, dated in *Oct* 1796, all in her own handwriting, subscribed her name, but did not seal it. It had a clause of attestation, but no witnesses. She died suddenly in *March* 1799; the Will was found locked in a chest of drawers inclosed in a piece of paper, on which was written in her own hand "Mrs. *Collett's* Will," and on another part of it "my Will." On the evening previous to her death, the Testatrix had asked her nephew as to her power of leaving two houses, and she then said she had left them, with some other things, to the very persons to whom they were bequeathed in this Will. The Will, however, was rejected. Cases of Wills similarly circumstanced, disposing only of personal property, having been rejected, are numerous. In *Hammond* v. *Ham-*

(*a*) The Reporter thinks it right to observe that he has not had the opportunity of examining the Precedent quoted.

WALKER v. WALKER.

*mond*, pronounced in 1801, a Will of only personalty was rejected, because of the attestation clause; it was neither signed nor witnessed, but was all in the Testator's handwriting. There was no date, but it was ascertained from the water marks in the paper to have been made in 1795; the Testator died in 1799. Some years before, one *Taylor*, an attorney, had made a Will for him, which was duly executed, and was attested; but being offended with some of the persons in whose favour that Will was made, he made the later one in question. He had locked it up in a box in his bedchamber: about a week before he died, he inquired whether, if his Will was all in his own handwriting, it would be good as to the disposal of his personal property, without being signed or witnessed; and the attorney told him that it would be good, as all his property was personal. Another case is, *Wade* v. *Overton*, pronounced not long after the last; it arose on a Will beginning, "I, *A. B.* do make this my Will all in my own handwriting" a seal was affixed to it, but it was signed only on the first sheet. The Testator had frequently declared that he had made his Will in favour of the party who was to take under this. Notwithstanding, the instrument has been rejected. This was a case of personal property only.

[HEATH, J.—No, it was a Will of both real and personal property; but the personal being all mentioned in the first sheet, the ground taken was that the signature on that sheet was meant to apply to that species of property only. The Court, however, held that the Will must be taken altogether, and construed as a whole].

A Will may be informal, yet complete; or formal yet incomplete: where it is incomplete as a whole, the presumption is, as has been shewn, against its operat-

ing partially. If this were a Will of personalty only, it would have been clearly incomplete (*a*), because the clause of attestation could not have been applied to any thing else. But still would it not have all that the law requires? and if so, why should it be incomplete? The answer is plain; because it gives notice on the face of it, that the party intended to add something to it; for completion, in all cases, looks to the mind of the party. The question is, not whether all is done which the law requires, but whether every thing has been done which the party thought necessary; and even if he should appear to have intended to add forms which are unnecessary, yet the instrument must be bad. As to the disposal of personal property, no form is necessary; and often the nearer the instrument approaches to form, and is yet short of complete formality, the more incomplete it becomes. A mere scrap of paper giving £20,000 to *A.*, without more words, would be admitted, because complete in itself, and finished by the party, and because it perfectly shews the intention; but if the same paper has also a clause of signature, but is not signed, though it is more formal, yet it is incomplete, and will be rejected, because it manifests an intention to do something more than is done to it. So also a paper "giving £10,000 to *A. B.* and" (stopping there) is bad: if the Testator begins "this is my last Will," and makes a correct disposition, and says no more, the Will is good; but if at the end he adds, "In witness whereof, I have hereunto set my hand," and omits to set his hand, it is then incomplete. This is the constant practice; and therefore *Cobbold* v. *Baas* must have been decided on a wrong ground. The mind of the party, therefore,

(*a*) *Griffin* v. *Griffin*, 4 Ves. Jun. 197 *in notis*.

WALKER v. WALKER.

at the time of making the instrument, is the great consideration.

The Testatrix in the present case, certainly intended, when she sat down to write this Will, to die testate; not, as the Appellants have endeavoured to shew, as to one part of her property only, and intestate as to the rest, but testate as to the whole. For, the bulk of her Will relates to her lands, the very property as to which it is contended she did not mean to die testate. This shews, her intention was universal, although the disposition is mixed. The signature, and the clause of attestation, are evidently written by the same hand, and at the same time, as the rest of the Will. This, therefore, cannot be in itself a complete instrument; for it is allowed that the deceased knew that three witnesses were necessary to pass land. It is clear she intended to do something more before she published the Will; if she postponed doing this, from whatever cause, it is sufficient to shew that her intention was not complete. We need not shew an abandonment of her intention; for, excepting the case where the act of God prevents the completion, the reason is immaterial.

In all former cases the envelope in which the Will has been found has operated in its favour; the superscription has been in terms, "the Will of *A. B.*," or "my Will," or some such decisive expression: but here the words of the envelope go strongly to support the inference, that the Testatrix had not completed her intention with respect to the paper. Now, it is said, her intention in signing and sealing this Will, was to make it operative as to her personal estate, knowing the then state of the law in this respect, and relying on *Cobbold* v. *Baas*. But, even if it were any

thing that she knew how the law stood, how can it be supposed that, circumstanced as she was, she could be acquainted with this almost obscure case? It is true, without this knowledge, she might have intended to dispose of her personal estate at all events; but then she would most probably have had two Wills for the two species of property; and it is hardly possible that, without considering this law, she could have thought an instrument she had not published, to which she had not given the name of her last Will, as to which she reserved the power to alter, to add, to retract, was capable of operating as a testamentary disposition of her personal property. Another reason has been adduced for her having postponed the attestation; namely, a habit of procrastination; but it is in evidence that she frequently said, "no one should defer making his Will." This, coupled with the envelope, is the most complete reason that can be given for her signing and sealing this instrument; it was, that as little might be left as possible. Thus, by giving her own reason, she effectually precludes all conjecture.

The letters produced unquestionably shew great affection to the Appellants; and it is quite clear from both the testamentary papers, that in 1777 and in 1789, they were the intended objects of her bounty. But her mind may have changed latterly, and it is in evidence that it did change. At any rate her intention appears to have been not perfectly settled, by her having lived twelve years with this instrument in her possession, intending a future act which she never performed, even supposing that act to have been important only with reference to the real estate.

It has been also endeavoured to account for the de-

fect of this paper from want of opportunity in the Testatrix, and from her parsimonious and recluse habits of life; but it is not possible to conceive such a total want of opportunity, except in the case of a person under confinement; and these allegations, also, are repelled by contrary evidence.

The allegations as to her having declared "that she had made her Will, that it would be found good," and such like expressions, all apply to a suspended purpose, as much as to a fixed intention, and certainly much better than to a divided one; for, not one of the witnesses says her expression was, "I have made my Will, and it *is* perfect," but all say "that it *would be* found to be good." In the conversation that took place after *John Walker's* death, where the immediate subject was real estate, her expression to this effect must be construed to be prospective, it being admitted that she knew the distinction that three witnesses were necessary to pass land; a formality which she could not forget was not added to the Will in question. If, therefore, she referred to this Will, her expression must be understood to regard what it would be when it had received the additional forms which she meant to give. This one declaration is sufficient to rebut the assertion, that she meant the Will to have a partial operation.

Another reason that has been given for the incompletion of this paper, is this, that, having the Will of her late uncle, *William Walker*, in her possession, which was left incomplete, she followed it as a model. Even supposing this could avail any thing, as it appears she had only the draft of this Will, (the Wills of which the probates were in her custody having each witnesses,) yet it is most likely in copying she would

have followed her model exactly; but, in fact, the attestation clause in this Will of *William Walker* runs thus, "signed, sealed, published, and declared by the said Testator," &c. whereas the deceased writes "signed, published, and declared by me, the said Testator," &c. and the forms are different in other respects. In fact, the attestation clause agrees more nearly with that of the Will witnessed by two witnesses, which disposed only of personalty, and of which she had the probate. This, indeed, may have impressed her with the idea that two witnesses were necessary for a Will of personal property.

As to the argument, which has been drawn from the clause of revocation inserted in this paper, no stress can be laid upon it; for such a clause is always inserted in Wills, and has never reference to any particular Will executed before (*a*); and the clause here does not at all differ from the usual form. The argument stands thus:—the deceased, by thinking it necessary to revoke all former Wills, must have imagined that she had before made some operative Will; it is clear that she had made no other Will than that of 1777; therefore, she must have thought that operative: but that Will appears to have been *quoad* the attestation clause, in precisely the same circumstances as the Will in question; so that if she thought the one good she must have thought the other so also.

[ROOKE, J.—The first Will (of 1777,) has evidently been cancelled, and appears incomplete; a part seems to have been cut off the bottom, and so near the

(*a*) See *Hyde* v. *Hyde*, 3 Chan. Rep. where it was decided that a revocation clause was merely "clericalis."

clause of attestation that names affixed to it may have been cut off.]

If this be admitted, the argument from the revocation must fail, supposing it to have been cancelled before 1789; and as there are no means of ascertaining the time when this was done, the Appellants can, at least, derive no advantage from it.

The reference to a Will, and the place where it was contained in that paper in which she enumerates her treasure, is more important; because the paper in question has been found in the place mentioned. But to make this decisive it must be shewn what was the date of the paper containing the reference. Now, besides that the treasure must have been an accumulation of many years, and that the state in which it was found did not correspond with the account contained in this paper, the person who first found it deposes that it was *an ancient* paper. It is most likely, that it was of prior existence to that of 1789, and that it was in progress to become her Will. But, even if she did intend to refer in this instance to the paper now in question, her calling it *a Will* is no proof of her having thought it complete at the time, for she calls it by that name in the envelope, though at the same time she announces its incompletion.

[ARNOLD, LL. D.—As she refers to her Will, immediately after enumerating the principal part of her personal property, may it not be contended that she meant her Will of that particular property?]

This argument might have availed if she had expressly said "her Will of the aforesaid property;" but

as the paper is in itself incomplete, such a presumption can hardly be admitted.

The next circumstance is the custody of this paper. In some cases much stress might be laid on this, but in the present it is of no avail. The deceased kept all sorts of papers; and there is no ground for supposing she would have taken less care of this paper which she intended for her Will, and which was in progress to become so, than of a Will complete and executed.

As to the paper in which she says that none of her clothes, &c. should be given to the daughters or family of *John Walker*, the only inference which can be drawn from it is that she thought herself not completely testate; and therefore it is a strong argument against the Will.

The Respondents, therefore, submit their claim, on these grounds,—first, That they are next of kin; secondly, That the Will is in itself incomplete; and, therefore, thirdly, That the presumption is against its operating partially; and, fourthly, That the tendency of the whole evidence is, to refer the incompletion of the paper to an unfixed purpose in the Testatrix.

Dr. *Lawrence*, in reply.

The Respondents have relied on the distinction between incompletion, and informality; but the distinction is inaccurate; for incompletion in their sense means incompletion in substance, and informality means incompletion in form. The distinction, therefore, originally taken between substance and form, is correct, and the argument grounded on it is just; for it would be mere pedantry to contend that an incompletion, merely in form, is equally essential with one in substance. The first presumption which arises out

WALKER v. WALKER.

of a paper left as a Will, as the one in question, is that it must be taken for a whole, and then when the attestation is omitted it is defective (a). But a second presumption arises on applying the maxim "reddendo singula singulis," (a presumption weaker than the first in the least possible degree,) that it was intended to be valid as to such property, as it had sufficient sanction to comprise. On this ground the case of *Cobbold* v. *Baas* (b) was right, and so far it is an authority. It was wrong in applying the twenty second section of the Statute of Frauds, the paper not being complete within the meaning of that clause.

The Respondents have said that a mere scrap of paper, if complete in itself, will avail as a Will; but that when formalities are in part added, the paper becomes for that reason incomplete. Admitted: but it is such an incompletion as requires the least possible evidence to account for it. It has also been said, that there is an old established rule that nothing but sudden death will be admitted to account for a defect in a testamentary paper. Upon searching the books no such clear rule appears, and if there be any such, it can hold good only as to defects in substance, for, whenever a question of fact and intention arises, evidence is admitted to supply a defect.

In the case of *Mason* v. *Limbery* (c), where the paper had a clause of signature, but was not signed, the circumstance which weighed with the Court was

(a) *Griffin* v. *Griffin*, *ubi supra*.

(b) 4 Vez. Jun. 200 *in notis*.

(c) Comyn's Rep. 451. and see a full note in Vin. Abr. Vol. VIII. tit. Devise, p. 139, pl. 17.—See also Bridgman's Analytical Index, tit. Will and Testament V pl. 37.

that a former executed Will was remaining uncancelled, in the Testator's custody: but for this, the subsequent paper would have been established as a Will of personal property, on the evidence adduced of the Testator's intention. It is improper to urge the practice and decisions of the Court from which the appeal comes; besides, the cases cited are many of them not in point. In *Wade* v. *Overton*, for instance, the paper was signed, not at the end, but on the first sheet only. Such a signature must be merely cursory; the Judge, therefore, thought that it was referable to an intention in the Testator of making the Will good for personalty. But the reason which has induced that judge to wish to lay down a positive rule in such cases is, the perplexity which the documents and evidence brought forward frequently occasion. In a free and commercial country, however, and with respect to property so unstable as personal property, no such strict rule can or ought to be laid down: but it is necessary that evidence should be always admitted to give that facility to the disposal of such property, which the law allows; and with this, indeed, the authorities agree. In *Cobbold* v. *Baas* evidence was admitted, and there were no such stringent facts as it is contended are necessary to account for the incompletion. In *Rider* v. *Rider* in 1701, the facts were, that in 1697, the deceased made a Will or testamentary paper, without any more particular date, to which he added the usual clause, "In witness whereof," but did not sign it. The contents of this paper were in favour of the Testator's brother. Some time afterwards the Testator gave it to his attorney, directing him to prepare another draft of Will, *in favour of his wife*; this was accordingly done, the date filled up in 1701, and the new draft read over to the Testator, who said he ap-

proved of it. But at his death it was found unexecuted. The Prerogative Court were of opinion that the deceased died intestate. On an appeal to the Delegates, they admitted evidence of a change in the Testator's intentions, of the custody of the papers and other circumstances; and even established the first paper notwithstanding its imperfection, and notwithstanding that it had been at one time clearly abandoned, and that the object of the second Will was the Testator's wife. For what reason could this be, but on the ground that the omission to execute the new Will was the strongest evidence that the Testator had resumed his first intention?

As to the supposed fact that the deceased in the present case followed the Will of *William Walker*, as her model, it appears that there are two Wills of persons of the same name; it is most probable she copied from that which purported to dispose of both real and personal property, and that, it appears, had only one witness. In the first place, therefore, this could not have satisfied this lady of the necessity of *two*; but, besides that, one witness is, by our law, no better than none at all, and certainly could not have answered the intention of an attestation clause to a Will of both real and personal property, to the mind of one knowing that three were necessary as to the former. But there is one fact, which the deceased could not fail to infer from this Will, namely, That a Will professing to pass land, and to be duly witnessed, might, though defective in not being attested to the extent necessary for that purpose, be yet a good Will of chattels. Moreover, with this Will in her possession, it is impossible she should have said that two witnesses were necessary for personal estate.

Then it has been said, it will not avail any thing that the deceased knew the law; and that, if it would, it is absurd to suppose her acquainted with the authority of *Cobbold* v. *Baas*. But this argument, involves a similar inconsistency; for if the idea of this lady was that the witnessing was indispensable, and if (as appears by the envelope,) she intended it to be done at a different time from the signature and sealing, she must have been acquainted with some of Lord *Mansfield*'s decisions, which have established that the witnesses need not see the party execute (a). It cannot, indeed, be supposed but that the deceased intended to do something by signing and sealing the paper; and, as to her own expression, that she did so to have it ready to be witnessed, it is absurd; for, signing and sealing are not preparatory acts; and in fact, when they were done, the Will was no more in readiness to be witnessed, than before. The truth seems to be that she intended to do as her uncle, *William Walker*, had done: namely, To give it as much validity as at the time she was capable of giving it, and to add the further formalities when a proper opportunity should occur. The fact of the cancelling the Will of 1777, is strong in support of this position; for, it seems that the seal has been cut off from this paper. There can be no doubt that the deceased did this deliberately and with an intention to cancel the instrument, which is a complete indication of her having thought that sealing gave the paper some force, for, if a person *undoes* by a solemn act, it proves that he thinks he has before *done* something. The act of sealing, indeed, is in itself indicative of intention, and dif-

(a) Vide *Right* v. *Price*, Doug. 241. and note the difference in the St. 29 Car. 2. c. 3. between section 5 and 6

fers from signing, which may be done *currente calamo* and without any pointed object.

In answer to our argument on the clause of revocation in the Will of 1789, as applying to the former Will (of 1777), it has been suggested from the state of the paper that it had probably been witnessed; but that the witnesses' names had been cut off. Now, on reference to the paper, it appears that no part of it is lost, there being now with it two slips of paper which appear to have been worn off, and which complete the whole. This paper being torn, and some of the names mis-spelt, accounts for the deceased's having written a second Will, in almost the same words as the first.

The declaration made by the deceased, "that *William Walker* would not have her lands," is two-fold; either it was meant universally, or it shews an intention to adhere to the Will. The disposition of her land is not the principal feature of the Will. Her greatest anxiety respects the tombs and her body. It is observable that the direction about letting the lands to *Wright* is to "her Executor and Executrix:" this she must have known could not avail unless they had the land, and that they could not have it by the Will unless it were duly witnessed. In truth, it seems to be meant as a direction to those who would succeed her, and must have been understood as imperative on their consciences The same observation applies to the direction about giving the clothes to *John Walker's* daughter-in-law, whatever was the motive of the deceased, that paper is directory to those who were to enjoy the property, and have the disposal of it after her death, and certainly could never have been meant for those persons against whom it is pointed.

Therefore, in point of law, this is a case in which something is wanted rather to rebut than to support the presumption in favour of the Will; and, from the circumstance of its including real property, a presumption, almost amounting to a rule of law, arises to account for its imperfection. There being persons of the whole, and others of the half blood, who claimed to be next of kin, and the usual preference of the whole blood, are grounds for supporting the Will, as they account for the anxiety of the deceased to do something for those whom she most esteemed, and as they are reasons why she should have been less anxious to complete the disposition of her real than of her personal property. The Testatrix had in her possession an instance of a Will conveying property of both sorts, good for personalty, though only witnessed by one person, an attestation certainly no more referable to the satisfaction of an attestation clause, than if there were none at all. She *sealed* the paper; an act more solemn, and indicative of intention, than mere *signing*; and she thought she was *doing something* by affixing her seal, as she thought it necessary in cancelling the former Will to cut off the seal. The evidence that the deceased knew three witnesses to be necessary for real property, and the improbability of her having said that two were necessary for personal property, point to a distinction in her intentions as to these two species of property. The papers found connect themselves with the Will. They were intended for the "Executor and Executrix" More particularly, the paper in which she refers to the drawer where the Will was to be found, shews she understood it to be operative. It is probable the envelope was round the first Will also; its whole force, therefore, as meant to stop the operation of the Will, must in that case be lost; because, by cutting off the seal, the deceased clearly thought it valid. The true

WALKER v. WALKER.

meaning of this envelope is, that she signed and sealed the Will to give it partial effect, and that she intended to add the further sanction of attestation, when an opportunity occurred. But, lastly, whether she did so intend, or did not, the acknowledgment of the Will in the paper by which she refers to it, and the drawer where it would be found, and the alteration in this reference, are circumstances amply sufficient to establish a subsequent intention that the instrument should operate, and to do away any effect which the envelope might otherwise have produced.

---

*Tuesday, Feb.* 19, 1805.

The argument being closed, the Judges Delegate decided,

That the deceased, *Ann Walker*, died intestate (*a*).

(*a*) I have been favoured with the note of a case certainly important, and not hitherto (as far as I can learn) in print, by my friend *John Hodgson*, of *Lincoln's Inn*, Esq.

---

END OF VOL. I. PART III.

# REPORTS

OF

# CASES

ARGUED & DETERMINED

IN THE

# HIGH COURT OF CHANCERY

Commencing in the Sittings before

*MICHAELMAS TERM.*

56 Geo. III. 1815.

Between WILLIAM DEVAYNES and LOUISA his Wife, and THOMAS MONSELL (an Infant), - - - - PLAINTIFFS.

AND

WM. NOBLE, SAM. PEPYS COCKERELL, FRED. BOOTH, MARY DEVAYNES, ELIZABETH SMITH, LESTOCK WILSON, JOHN MORRIS, and JOSEPH DOWN, - - - - DEFENDANTS.

And between SIR THOMAS BARING, Bart., and SIR FRANK STANDISH, Bart., (on behalf of themselves, and all other the Creditors of the partnership of WILLIAM DEVAYNES, JOHN DAWES, WILLIAM NOBLE, RICHARD HENRY CROFT, and RICHARD BARWICK, who shall come in and contribute, &c.) - - - - PLAINTIFFS.

1816.

Rolls, *July* 15—30.

AND

The said WILLIAM NOBLE, SAMUEL PEPYS COCKERELL, FREDERICK BOOTH, LESTOCK WILSON, JOHN MORRIS, JOSEPH DORIEN, WM. DEVAYNES, and LOUISA his Wife, MARY DEVAYNES, ELIZABETH SMITH, and THOMAS MONSELL,

Defendants.

On the death of a partner in a banking-house, the surviving partners carry on the business without changing the firm, and afterwards become bankrupt. The equities of the several classes of creditors of the partnership against the estate of the deceased partner, with reference to the alleged solvency of the house at his death, to the effect of subsequent dealings and transactions with the survivors, and of notice expressed or implied, and to the custom of bankers, declared, upon exceptions to the report of the Master, distinguishing the classes of creditors according to the different nature of the circumstances.

BY the decree made on the hearing of these causes, (*March* 2, 1812,) it was referred to the Master, in the second cause, to take an account of what was due, at the death of *William Devaynes*, deceased, from the partnership of the said *William Devaynes*, *John Dawes*, *William Noble*, *R. H. Croft*, and *Richard Barwick*, to the Plaintiffs, and all such other persons as were creditors of the partnership at the time of the death of *Devaynes*, and also of what was due, at the time of making the decree, from the partnership to such creditors; and to inquire whether such creditors, or any, and which of them, continued to deal with the surviving partners after the death of *Devaynes*, and what sums of money were paid by the surviving partners to such creditors, respectively; from the death of *Devaynes* to the bankruptcy, and what had since been received by them respectively; and also whether such creditors, or any and which of them, had, by such subsequent dealings, released the estate of *Devaynes* from the payment of their respective debts, or what (if any thing) remained due in respect thereof. And it was

1815.

DEVAYNES v. NOBLE. BARING v. NOBLE.

ordered that, in making such inquiries, the Master should state to the Court any special circumstances.

Under this decree, the Master made his separate report, dated the 15th of *March*, 1815, whereby he found that, in respect of the amount of many of the debts claimed to have been due from the partnership at the death of *Devaynes*; and in respect of that part of the decree by which he was directed to inquire whether the creditors, or any and which of them, had by their subsequent dealings released the estate of *Devaynes*; and also, in respect of the special circumstances material to that inquiry, there were several general questions of equitable principle, upon the decision of which the liability of the separate estate of *Devaynes* to a great part of the debts would depend; and that, in respect of the said general questions, the said claims were capable of being reduced to a few different classes, so that the decision of one case in each class would virtually dispose of all the rest; but, as he conceived some of the questions to be of considerable difficulty, and that if he should form an erroneous opinion thereon for the purpose of a general report upon the matters in reference, it might subject many of the claimants to further investigation, productive of useless expence and delay; he had thought it right, in the first instance, to select a leading claim of each class, and submit them to the consideration of the Court in a separate report; and he had therefore selected, from the claims so brought in, the several claims of *E. B. Sleech*, spinster, Sir *John Palmer*, Bart., *Nathaniel Clayton*, Esq., *Ann Johnes*, spinster, the Plaintiff, Sir *Thomas Baring*, (as Executor of *John Wigglesworth*, deceased), *John Warde*, Esq., *Jane Pott*, widow, and *Robert Houlton*, Esq.; and, in respect of such selected claims, the Master reported the

1816.

DEVAYNES v. NOBLE. BARING v. NOBLE.

General facts of the case.

following facts, as stated and proved, or admitted, before him.

The said *William Devaynes*, deceased, for many years prior to, and until, the time of his death, carried on business as a banker, in partnership with *Dawes*, *Noble*, *Croft*, and *Barwick*, under the firm of *Devaynes*, *Dawes*, *Noble*, and Co.; and died on the 29th of *Nov.* 1809, seized and possessed of a considerable real and personal estate, leaving *William Devaynes*, (Plaintiff in the first cause, and Defendant in the second,) his son and heir at law; having first made his Will, and thereby devised and bequeathed his said real and personal estate to the Defendants *Noble*, *Cockerell*, and *Booth*, (whom he also appointed Executors), upon trust, after payment of certain annuities, and of his debts and legacies, for his son, the said *Wm. Devaynes*, at twenty-seven, and for his issue in the manner therein mentioned; and the Testator thereby directed that, in case it should be agreed after his death to admit his said son an equal partner in the banking-house, his Trustees should advance £10,000 out of the said estates, as his capital, to remain in the house for five years, whether his said son should be living or dead, at interest after the rate of £3 *per cent.*; and, after the expiration of the five years, in case his son should be then living, at the same rate of interest as the other partners should receive for their respective capitals; and he thereby declared that the said £10,000, and the interest thereof, should be deemed part of the trust-monies arising from the sale of his estates, and be subject to the trusts thereof, and be called in and applied upon the said trusts at the end of the five years, in case his son should then be dead without having attained a vested interest therein. From and after the death of *Devaynes*, the said *Dawes*, *Noble*,

1816.

DEVAYNES *v.* NOBLE. BARING *v.* NOBLE.

*Croft* and *Barwick* continued to carry on the banking business under the same firm of *Devaynes*, *Dawes*, *Noble* and Co., on their own proper account, the representatives of *Devaynes* having no continuing share or interest in the business, or in the profits thereof; but being entitled by the partnership agreement only to his share of the profits to that period, and to his share of the then subsisting joint capital and effects, after payment of all the partnership debts and charges then charged and chargeable thereon. *Devaynes*, the son, did not become a partner; but shortly after the Testator's death, (he being then above twenty-one, but not twenty-seven, years of age,) made known to the Trustees and Executors, and to the surviving partners, his determination not to avail himself of the conditional directions in the Will, but to decline the same, in consequence whereof the Trustees did not place the £10,000, nor any other sum, in the house for him, or on his behalf. Neither *Devaynes* the son, nor the Trustees, in any manner consented to the name of *Devaynes* being continued in the firm, except in so far as *Noble* (who was one of the Trustees, and also one of the surviving partners) did, in his capacity of partner, concur therein with the other surviving partners; but, on the contrary, shortly after the death of the Testator, and at the request of *Devaynes* the son, the Trustees gave notice in writing (*a*) to the surviving

(*a*) This notice, as appeared in a subsequent stage of the proceedings, bearing date *March* 1st, 1810, *and signed by the Executors themselves*, was in the following words: "Gentlemen, we observe that you continue to use, in the carrying on of your banking business, the name of Mr. *Devaynes*, and that no alteration has, in consequence of his death, been made in your firm. This may, probably, induce the public to believe that we, as Mr. *Devaynes*'s Executors, have some interest in the house,

1816.

DEVAYNES v. NOBLE. BARING v. NOBLE.

partners, "that the use of the name of *Devaynes* in the firm was without their consent, and that they considered the Testator's estate as wholly unconnected with the house;" which notice was drawn up and served by Messrs. *Clayton* and *Scott*, as solicitors for the Trustees: but Mr. *Clayton*, (who was one of the selected claimants,) being resident at *Newcastle*, did not (as appeared by his examination before the Master) know of the transaction until after the bankruptcy; Mr. *Scott* personally transacting the business in *London*, on behalf of himself and his partner; nor did it appear by any evidence before the Master, that any of the other selected claimants at any time knew or heard that any such notice had been given. It also appeared that the Trustees had, by their said solicitors, (but without the personal intervention or knowledge of *Clayton)*, taken the opinion of counsel on the question whether they had power to prevent the surviving partners from continuing to use the name of *Devaynes* in the firm, and that the answers given were, that they had no such power, and that, if the name were used without their consent, no responsibility could attach upon the estate, whereupon they desisted from further opposition to the name being so used.

General statement of the claims of the several classes of creditors.

The Master further reported, that the several selected claimants were all persons who, before and at

and we therefore feel it incumbent upon us, in pursuance of the advice of our counsel, (copies of whose opinions we inclose for your information,) to give you notice that the use of Mr. *Devaynes's* name in your firm is without any consent of ours, and that we consider our estate to be wholly unconnected with your present partnership concern, beyond the claim we, as Mr *Devaynes's* Executors, have for the balance that was due to him at the time of his death."

the death of *Devaynes*, dealt with the said house of *Devaynes*, *Dawes*, *Noble*, and Co., as their bankers; and had respectively, at the time of *Devaynes*'s death, such claims against the house in respect of cash balances, due to them, and of stocks and securities lodged with, and under the contróul and management óf, the house, as after mentioned; and all the said claimants (with the exception of *Houlton*) admitted that they became informed of *Devaynes*'s death by the public papers, wherein the same was mentioned immediately, or very shortly, after the event. But it was alleged by some of them that, finding no alteration in the firm, they supposed the estate, or the family, of *Devaynes*, to be still interested therein, and responsible for the debts and transactions thereof; and, without making any inquiries to ascertain the truth or falsehood of that opinion, they continued to deal with and employ the house as their bankers from the time of *Devaynes*'s death to the time of the bankruptcy of the surviving partners.

Custom of bankers.

The report proceeded to state the ordinary course of the banking business in *London*, in which the only general mode of stating and adjusting accounts between bankers and their customers residing in or near the metropolis, is as follows:—

A book, called a *passage-book*, is opened by the bankers, and delivered by them to the customer, in which, at the head of the first folio, *and there only*, the bankers, by the name of their firm, are described as the debtors, and the customer as the creditor, in the account; and, on the debtor side, are entered all sums paid to or received by the bankers on account of the customer; and, on the creditor side, all sums paid by them to him, or on his account; and, the said entries

1816.
DEVAYNES v. NOBLE. BARING v. NOBLE.

being summed up at the bottom of each page, the amount of each, or the balance between them, is carried over to the next folio, without further mention of the names of the parties, until, from the passage-book being full, it becomes necessary to open and deliver out to the customers a new book of the same kind. For the purpose of having the passage-book made up by the bankers from their own books of account, the customer returns it to them from time to time, as he thinks fit; and, the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who, thereupon, examines it; and, if there appears any error or omission, brings or sends it back to be rectified, or, if not, his silence is regarded as an admission that the entries are correct; but no other settlement, statement, or delivery of accounts, or any other transaction which can be regarded as the closing of an old, or opening of a new account, or as varying, renewing, or confirming (in respect of the persons of the parties mutually dealing,) the credit given on either side, takes place in the ordinary course of business, unless when the name or firm of one of the parties is altered, and a new account thereupon opened in the new name or firm. The course of business is the same between such bankers and their customers resident at a distance from the metropolis, except that, to avoid the inconvenience of sending in and returning the passage-book, accounts are, from time to time, made out by the bankers, and transmitted to the customer in the country, when required by him, containing the same entries as are made in the passage-books; but with the names of the parties, debtor and creditor, at the head, and with the balance struck at the foot of each account; on the receipt of which accounts, the customer, if there appears to be any error or omission, points out the same by letter to the

1816.
DEVAYNES v. NOBLE.
BARING v. NOBLE.

bankers; but, if not, his silence, after the receipt of the account, is in like manner regarded as an admission of the truth of the account, and no other adjustment, statement, or allowance thereof, usually takes place.

The report proceeded to state that the several selected claimants, (with the exception of Sir *John Palmer*, *Clayton*, and *Houlton*), were all persons resident in or near the metropolis, who conducted their business with the house of *Devaynes*, *Dawes*, *Noble*, and Co., as to their said accounts, according to the general custom, by means of their respective passage-books; and, that the said Sir *John Palmer*, *Clayton*, and *Houlton*, being resident at a distance from the metropolis, conducted their business with the house according to the custom, in respect of customers so resident.

On the 30th of *July*, 1810, the surviving partners became bankrupt, and the Defendants, *Wilson*, *Morris*, and *Dorien*, were appointed assignees.

The report further stated that no settlement of accounts had taken place, since the death of *Devaynes*, between his Executors and the surviving partners, or their assignees, in respect of the partnership; but that it was alleged, on the part of *Devaynes* the son, that the cash credits, and effects of the house, at the death of *Devaynes*, greatly exceeded the amount of all debts and demands for which the house was then liable, except the sums due from the house to the respective partners; and therefore, if all the other creditors had then immediately called on the house for payment of their respective demands, they would all have been satisfied; while, on the other hand, it was alleged, on

1816.

DEVAYNES
v.
NOBLE.
BARING
v.
NOBLE.

the part of the claimants, and of the assignees, that the house was not solvent at *Devaynes*'s death; but then owed to its creditors collectively (not including the respective partners,) much more than all its cash credits and effects were really worth, so that, if the creditors in general had then called for payment, the house must have immediately stopped. But the Master found that the difference between these statements chiefly arose from the great amount of the credits, or outstanding debts due at that period to the banking-house, which had since proved bad, or irrecoverable; which bad debts were included in the former, but excluded from the latter statement; that, though it was contended, on the part of *Devaynes* the son, that a great part of such debts as had since proved bad might have been good if called in at the time of the Testator's death, the contrary was maintained on the other side, and it was impossible for the Master, upon any evidence laid before him, to decide that question. The Master was, therefore, unable to state whether, if an account were taken, between the Executors and the assignees, of the partnership stock, credits, and effects, at the time of *Devaynes*'s death, and of the debts then due from, as well as the good debts due to, the partnership (excluding the separate accounts of the partners), the house would be found to have been at that time in solvent circumstances; and, still less, whether all, or what proportion of, the debts then due from the house might have been paid to the then joint creditors, if they had immediately called for payment thereof; nor did he conceive it possible to form any certain or probable conclusion on those questions, without first taking such accounts between the executors and assignees, and also entering into difficult and extensive retrospective inquiries as to the circumstances of other persons indebted to the house at the time, who had since proved

1816.

DEVAYNES v. NOBLE. BARING v. NOBLE.

insolvent; wherefore, and because the decision of the questions, as to the solvency of the house at the time of *Devaynes*'s death, and as to the consequence which would have followed if the surviving partners had immediately been called on for payment of the debts of the house, did not appear to the Master to be necessary to the accounts and inquiries referred to him by the decree, he declined to investigate the same; but found that, in point of fact, the house continued in good credit from the time of *Devaynes*'s death till the 30th of *July*, 1810, when it stopped payment, and that the several selected claimants, having no doubt of the responsibility of the house, continued to deal, and keep cash securities, with the said house, until the last mentioned period, without in fact drawing for, or demanding payment of, the balances respectively due to them, or applying to have their respective securities and stocks delivered up, or transferred to them.

[The Master then went on, by his report, to state the evidence adduced in support of the several selected claims; but for the present purpose, it appears to be more convenient to state the nature and general circumstances of each several claim, in the order in which it came on to be heard, followed by the arguments and judgment in each case.

---

*July* 15—17, 18—22.

SLEECH'S CASE.

Creditors, at the death of *D.*, who continued to deal with the surviving partners, and were paid by them in part

*First*, the case of Miss *Sleech*, representing that class of claimants, who were creditors of the house at the death of *Devaynes*, and afterwards continued to deal with the surviving partners, the operation upon whose debts by the subsequent dealings was merely a payment, or payments, to or to the use of the creditors, by the surviving partners.

As to these, the Master reported his opinion to be,

1816.

DEVAYNES
v.
NOBLE, &c.

SLEECH'S CASE.
(Including, also, creditors whose debts remained unaltered, either by receipt or payment, and those whose debts had been subsequently increased by payments to the surviving partners.)

Held no discharge of the deceased partner's estate.

that such creditors had a right to resort to the estate of *Devaynes*, for the balance due to them, after deducting such payments made by the surviving partners.

The representatives of *Devaynes* excepted to this report, on the general ground, that, by the subsequent dealings, the creditors had released his estate, and assumed the surviving partners as their debtors.

[There were two other classes of claimants, whose cases, it was conceived, would be disposed of by the judgment respecting this class, and whose claims were consequently not made the subjects of selection; *viz.* those upon whose debts there had been no operation, either by receipt or payment, since *Devaynes*'s death; and those, where the operation had been merely a payment, or payments, to the surviving partners.]

The only special circumstances in Miss *Sleech*'s case were the following. At the death of *Devaynes*, she had a balance of £366 on her account with the partnership. On the 31st of *January*, 1810, (two months after his decease) she drew a draft or check on the house, in the name of the old firm, for £50 which was paid to the bearer. No other receipts or payments took place till the bankruptcy, under which she proved for £316, (the balance remaining), received dividends upon that debt, which reduced it to £216, and, afterwards, signed the certificate of the bankrupts.

*Hart*, *Wetherell*, and *Sidebottom*, *Martin*, and *Hazlewood*, and *Abercromby*, for different representatives of *Devaynes*, in support of the exception.

*Bell* and *Palmer*, for Miss *Sleech*, and *Fonblanque* and *Clayton*, for the assignees of the surviving partner, sustained the Master's report.

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

*In support of the Exceptions.*

The question lies within a narrow compass, and is, Whether, inasmuch as the debt is extinguished in law by the death of Mr. *Devaynes*, Miss *Sleech* knowing of his death, and, with that knowledge, continuing to deal with the surviving partners, (which in fact amounts to an authority to the surviving partners to keep her money at their disposal,) these circumstances do not amount, in fact, to an acquittance of *Devaynes*'s estate.

In general, it must be admitted that, where a loan is made to two persons, one of whom dies, and the lender afterwards receives his interest from the survivor, that circumstance will not discharge the estate of the deceased. But there is a peculiarity in the custom of dealing between bankers and their customers, which renders their case quite distinct from that of ordinary borrowers and lenders. A banker is rather the bailee of his customer's funds than his debtor (*a*). The contract between them is, that the banker shall

---

CARR *v.* CARR.

ROLLS, *Nov.* 30, 1811.

Money at a banker's held to pass under a bequest of all debts due to the Testator at the time of his death.

The Testator bequeathed to the Plaintiff "whatever debts might be due to him, (the Testator) *from the Plaintiff or others*, at the time of his death;" and gave the residue of his personal estate to the Defendant.

Besides other debts due to the Testator at the time of his death, his bankers had in their hands a bill of exchange, drawn by the Plaintiff, and made payable to the Testator, which had been so drawn on account of a debt then due from the Plaintiff to the Testator, and which had not yet become payable. The Testator had also a cash balance due to him on his banker's account. The questions were, Whether this

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

not so dispose of those funds as not to have them forthcoming at a moment's warning. If the money (which, for this purpose, must be taken as any ordinary merchandize) be deposited in the hands of several, as partners, and one dies; and if the bailor, by continuing

bill of exchange, and the said cash balance, or either of them, passed to the Plaintiff by the above bequest.

Sir *S. Romilly* and *Bell*, for the Plaintiff (*a*),

Contended that they clearly passed; that they were choses in action, and could only be recovered by action, and therefore must be considered as debts.

*Hart* and *Wetherell*, for the Defendant,

Submitted that the bill of exchange, under these circumstances, must be considered as having been delivered to the bankers by the Testator as money, and that it was therefore to be considered as if in his own possession. And, as to the cash balance, they contended that this could not be considered as a debt in the contemplation of the Testator; that, though strictly speaking, a debt, yet it was, in the common opinion of mankind, considered as money deposited with the banker; that, in construction of Wills, words ought not to be taken according to their strict legal meaning, but according to the intention of the Testator; and that, in this case, the Testator could not have conceived it to be a debt.

Sir *S. Romilly*, in reply.

This is clearly a debt; it might be proved under a commission of bankrupt; or a commission might be taken out upon it; it would not pass under a bequest of all the Testator's ready money, and therefore must clearly pass as a debt.

(*a*) The arguments and judgment, *Ex relatione*.

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

to deal with the survivors, is not to be considered as thereby indicating his determination, amounting to an authority, by which the survivors are to hold the fund absolutely as against the representatives of the deceased partner; the consequence must be that the moment a banker so circumstanced dies, his Executor is bound, for the safety of his estate, to lay his hands upon every farthing of money in the banking-house, in order to see that it is properly divided and appropriated among the customers. But an interference of

---

The MASTER *of the* ROLLS

Was clear that the bill of exchange passed. He had entertained some doubt on the other point; but thought that the money which had been paid into the banker's ought also to pass as a debt. This was not a despositum. A sealed bag of money might, indeed, be a despositum; but money paid in, generally, to a banker could not be so considered. He observed, that money had no ear-mark; that, when money is paid into a banker's, he always opens a debtor and creditor account with the payor. The banker employs the money himself, and is liable merely to answer the drafts of his customer to that amount. This would clearly support a commission of bankrupt; it would not pass by the description of ready money; and, therefore, it must be considered as a debt, and must pass by that description.

The Plaintiff was accordingly declared entitled to the debt due on the bill of exchange, with interest from the time the same became payable; and to the balance of cash at the banker's, with interest from the Testator's death, and also to the several other debts which were due and owing by him and others to the Testator at the time of his death. And it was ordered that the Defendant should join with the Plaintiff in enabling him to receive what debts were due to the Testator at the time of his death, other than those already received by the Defendant.—Costs for Plaintiff.

Reg. Lib. A 226.

1816.
DEVAYNES
v.
NOBLE, &c.
SLEECH'S CASE.

this sort would be quite inconsistent with the custom of bankers. The Executors of Mr. *Devaynes* would have had a right to go into the banking-house immediately after his decease, and insist upon having a joint controul over the funds with the surviving partners. But that right would cease from the moment that the surviving partners could satisfy them that such controul was unnecessary for their indemnity; which it becomes, in fact, by the circumstance that the customers who had deposited the money with the *five*, knowing that one of the five was gone out, and that the legal responsibility survived to the *four*, continued to deal with the fund by drawing on the *four*, and, by so doing, authorized the *four* to hold it, as the parties responsible to them for it.

The present claimant, in her affidavit before the Master, says, that the firm continuing the same after the death of Mr. *Devaynes*, and no settlement of accounts having taken place with her, the impression upon her mind was, that she continued to have the responsibility of his estate, or of his family. But, whatever was the impression under which this lady acted, if it can be shewn that it originated in a mistake of law, the estate of Mr. *Devaynes* cannot be affected by it. In point of fact, she kept her money in, and continued to transact business with, the banking-house, after she knew of the death of *Devaynes*, thinking it more convenient to herself to have her money there at her demand whenever she might require it, than to have to call upon the Executors of the deceased partner to see that it was paid her directly.

The language of the Lord Chancellor in Ex parte *Kendall* (a), (a case which arose out of this very bank-

(a) 17 Ves. 11. p. 519. "The next consideration is, whether the creditors of the five have a separate demand

1816.

Devaynes v. Noble, &c.

Sleech's case.

ruptcy,) justifies the view which we take of the nature of these transactions. In the present case, the debt is extinguished at law. A Court of Equity has (undoubtedly), upon general principles, said, that there shall be a recourse against the assets of a deceased partner. But we fix upon the peculiar relation between a banker and his customer, and the acts of the customer, as justifying the surviving partners in retaining the balance in their hands; for the business of a banker would be mischievous, if, the instant a death happened, the surviving partners would be under the necessity of refusing payment to the customer until it should appear how the accounts stood between them and their deceased partner; or, on the other hand, if the Executor of the deceased partner could stop the business of the house by saying, let me see how the accounts stand before you pay another shilling, for my Testator's estate may be answerable, and therefore I insist upon knowing before you act any further.

The several cases which have established the right,

against *Devaynes*'s estate.—Upon the authority referred to, (*Gray* v. *Chiswell*, 9 Ves. 118), and others, where parties think proper to enter into a joint, instead of a joint and several contract, though I am surprised, that Courts of Equity have not left that to its fate, as a joint contract, they have, I admit, said that there is a remedy against the assets of one deceased, if the survivors cannot pay. That must be, however, subject to many considerations that may arise out of circumstances of subsequent dealings with the survivors; the effect of which may be, that the creditors have no remedy against the assets; but, to oust their *primâ facie* demand, it must be shewn that their subsequent dealings are of such a nature as to shift the equitable obligation to pay from the estate of the deceased partner.

1816.
DEVAYNES
*v.*
NOBLE, &c.
SLEECH'S CASE.

in equity, of a joint creditor to follow the assets of a deceased partner, will be cited on the other side; but it is right to notice them here, in order to point out in what particulars they do not apply to the present.

The first, after *Lane* v. *Williams* (*a*), which is generally resorted to as laying down the principle, is *Heath* v. *Percival* (*b*); in which, (as in many of the other cases that will be mentioned,) the creditor held the joint bond of the partners; and, although there had been such dealings between the creditor and the surviving partner as would have raised an equity sufficient to rebut (according to Lord *Hardwicke*'s phrase (*c*),) the equity of the creditor claiming against the estate of the deceased partner; yet the Court held that the *legal* right attached to the bond could not be removed; and on that ground, and that only, decided in favour of the claimant.

In *Bishop* v. *Church* (*d*) also, there was a joint bond; and here it is that Lord *Hardwicke* lays down the principle already alluded to; and which ought to be kept closely in view throughout the present discussion. He does not say that the creditors of a firm, not obtaining payment from the surviving partners, have an unconditional, absolute right to fix, in equity, the assets of a deceased partner; but that theirs is an equity "which may be rebutted by circumstances" (*e*).

(*a*) 2 Vern. 277, 292.

(*b*) 1 P. W. 683.

(*c*) In *Bishop* v. *Church*, the next case cited.

(*d*) 2 Ves. 100, 371.

(*e*) "The Plaintiff must come as from a pure fountain."

In *Hoare* v. *Contencin* (*a*), Lord *Thurlow* dismissed the Bill. It will probably be alleged that, in that case, it did not appear the surviving partners were insolvent; but that was not the ground of Lord *Thurlow*'s decision, nor was it so understood to be by the present Lord *Chancellor*, who, in Ex parte *Kendal* (*b*), says, "It was contended that, though at law the debt survives, a demand may, under circumstances, be maintained in equity against the assets; and, that it is so in many cases, is established; though doubted extremely by Lord *Thurlow* in *Hoare* v. *Contencin*." And, in another place (*c*), adverting again to "Lord *Thurlow*'s doubt in *Hoare* v. *Contencin*," he couples it with "his own surprise, that a Court of Equity should have interposed to enlarge the effect of a legal contract," although he adds, "the modern doctrine certainly is, that where a man has chosen to take the joint credit of several, though at law his security is wearing out, as each of his debtors dies, yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a Court of Equity will, under certain modifications, constitute that demand."

In *Hoare* v. *Contencin*, therefore, Lord *Thurlow* doubted this equitable right against the property of a deceased partner altogether; but in none of the cases is that right laid down as an absolute and unqualified principle. On the contrary, it is always stated as an equitable and moral claim, which may be met by an equitable and moral defence. The ground is this, that, though the claim in law is dissolved, it is contrary to

(*a*) 1 Bro. 27.
(*b*) 17 Ves. 514, p. 582.
(*c*) 17 Ves. p. 25.

1816.

DEVAYNES v. NOBLE, &c, — SLEECH'S CASE.

principles of equity that the deceased partner shall remain solvent, and not satisfy his engagement. But, if such is the principle, it follows that in every case the circumstances of the claim must be examined into; and the true question upon this exception, (the same that will mainly arise upon all the other exceptions), is, whether or not those who claim to set up this equity against *Devaynes*'s estate have, by their own conduct, (their ignorance, or *laches*, or omitting to sue, when they might have recovered against the surviving partners,) created a case which, in point of moral justice, countervails the equitable principle which the Court has raised in their favour. The cases of *Daniel* v. *Cross* (*a*), and *Stephenson* v. *Chiswell* (*b*), fully confirm this view of the doctrine of the Court.

Supposing the creditors of a firm to have a right, instantly on the death of one of the partners, to file a bill to compel the surviving partners to pay them, the question then will be, what is that species of conduct on the part of the creditors which amounts to what a Court will consider as unconscientious neglect, constituting a sufficient answer to rebut the original equity which, for the argument's sake, I will admit to exist. The equity must, in such case, vary with the time which is suffered to elapse, during which the creditors might, if they had pleased, have prevented the surviving partners from applying the funds to their own purposes, from wasting them, from engaging them in new dealings and speculations. There must be one equity for the delay of an hour, another for one month, another for nine months. The Court will never say that their original equity is to be kept alive with a

(*a*) 3 Ves. 277. (*b*) 3 Ves. 566.

total disregard to their intervening conduct, and that, when a bankruptcy takes place, the effects of the deceased partner are to be wasted, to make good a loss which would never have happened if they had applied sooner.

The equity thus administered against the representatives of a deceased partner, cannot place them in a less favourable situation than that of a surety, the surviving partners being in the place of the principal. Now, will a Court of Equity permit the obligee in a bond, by extending the day of payment, to protract the responsibility of the surety; and, after suffering nine months to pass without taking the trouble even to demand payment of the obligor, a bankruptcy having since intervened, to call upon the surety to make good the debt, the payment of which has been prevented by his own voluntary neglect? The contrary is clearly established. *Nisbett* v. *Smith* (a), *Rees* v. *Berrington* (b).

Again, according to a known principle of mercantile law, if the holder of a bill gives time to the acceptor, he thereby discharges the drawer; and this is a rule which bears the closest analogy to the case before the Court, being instituted for the purpose of preventing injury to the drawer, who, if he had had notice in due time of the acceptor's refusing payment, might perhaps have taken measures to compel it. This is now so much the established and invariable rule at Guildhall, that Lord *Ellenborough* has repeatedly said, if the drawer of a bill has effects in the hands of the acceptor at any time between the time of drawing and

(a) 2 Bro. 579. (b) 2 Ves. jun. 540.

1816.

DEVAYNES v. NOBLE, &c.

the acceptance, he will not enter into the question of more or less time, or into the period when drawn, or the circumstances of relative situation between the drawer and acceptor previous to the acceptance (*a*).

SLEECH'S CASE.

In the present case there is a period of nine months, between *Devaynes*'s death and the time of the bankruptcy, during which Miss *Sleech* suffered her cash balance, such as it was at the death of *Devaynes*, to remain in the hands of the surviving partners, without demanding payment; except that, about four months after, she drew for £50. What inference could be drawn from the circumstance that *Devaynes*'s name continued in the firm, admitting that she knew the fact of his decease, it is not easy to conjecture. For nothing is more common, both in banking-houses and other partnerships, than for the name of the firm to remain unaltered, during a period of fifty years or more, notwithstanding the many changes that may have happened in the persons of the individuals composing it. At law, the death of one partner is a dissolution of the contract between that partner and the customer of the firm; and to allow the customer to infer, from the circumstance of the name continuing, any interest in the representatives of the deceased, would be to allow an inference to be raised against a known and positive rule. None of the cases amount to this, where a creditor has not even demanded payment of the survivors, and yet shall be permitted to come into equity against the representatives of the deceased, although, in fact, his money continued in the firm for eight months after

(*a*) See the references to *Chitty* on Bills of Exchange, p. 212. *Hammond* v. *Dufrene*, 3 Campb. 145. *Rucker* v. *Hiller*, *ib.* 217. *Robins* v. *Gibson*, *ib.* 334

his death, and to say, I am now in the same situation as if I had used the utmost diligence, and filed a Bill immediately on the death of the deceased partner.

The case of bankers is stronger than that of ordinary traders, because the money in their hands is rather a deposit than a debt, and may therefore be instantly demanded and taken up; and this is the reason why nobody ever hears of an action against a banker to pay a balance, unless in the case of disputed items. If a man deposits a collection of pictures in the hands of a partnership, and one of the partners dies, and nine months afterwards a fire happens, by which the pictures are consumed; can he come into a Court of Conscience, and say to the Executors of the deceased, you must make good the loss sustained by the surviving bailees? The trust reposed in a banker arises out of personal confidence; and the case of a banker is the strongest that can be put where the fact of giving credit to the surviving partners, or of a little more or less of negligence in the support of a claim, raises a strong equity either for or against the demand. The negligence is inexcusable in the eye of a Court of Equity, in proportion to the facility with which the money might, but for it, have been secured. And, upon these principles, we say that the fact of continuing the money in the hands of the survivors for nine months, is evidence of a transfer of credit from the old to the new partnership.

In assuming the solvency of the house at the time of *Devaynes*'s death, we would not be understood to mean that if all the customers of the house had instantly on the event, and at the same moment, gone

and demanded payment, the whole amount of their money would have been forthcoming. The report states the Master to be of a contrary opinion; and the most punctual and opulent banking-house, or house of trade, in the metropolis, cannot be asserted to be solvent for such a purpose. The solvency of which we speak, and which the facts of the case sufficiently establish, is the ability to pay in the ordinary course of payment. But, suppose they were only partially solvent, the argument is still the same in substance, though not in extent. In the cases of sureties (*a*), the argument is not gone into, whether the surety is or is not damnified by giving time, nor whether more or less injury arises from want of notice; and Lord *Loughborough* expressly says (*b*), "I cannot try the cause by inquiring what mischief it might have done; for that would go into a vast variety of speculation, upon which no sound principle could be built." The surety has a right, the day after the bond is due, to come and insist upon its being put in suit. And Lord *Ellenborough* lays down the same doctrine as applicable to the case of drawer and acceptor.

The hardship on the representatives of *Devaynes* is the same, whether, at the time of his death, the partnership was able to pay the whole, or only a part of its debts; for it has been decided by the Lord Chancellor, in Ex parte *Ruffin* (*c*), and Ex parte *Williams* (*d*), that where, upon the death of one partner, the survivors take the property into their own hands, and go on in the usual course of trade, and then fail, there

(*a*) *Rees* v. *Barrington*, 2 Ves. jun. 540, &c. and see *Boultbee* v. *Stubbs*, 18 Ves. 20.
(*b*) 2 Ves. jun. 543.
(*c*) 6 Ves. 119.
(*d*) 11 Ves. 3.

can be no apportionment of the former and after-acquired property, but the old and new creditors must take equally out of the amalgamated fund.

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

Then consider the mischief likely to result from this claim being allowed. If a man is once satisfied that he retains in his power an ultimate guarantee of payment in the recourse which equity gives him to the estate of a deceased partner, what temptation does this hold out to afford every possible facility and accommodation to the surviving partners; what an opening to the influence of connexion and favour. How easy will it be, with most persons, to reconcile the mind to this species of moral fraud, by the excuse that it is the law of the land which gives this subsidiary right to the customer. No man can be more desirous than the Lord *Chancellor* appears, from the report of Ex parte *Kendal*, to be, of repudiating the notion that a Court of Equity ever meant to proclaim this public licence of negligence and injustice.

But, supposing this claimant is not, in consequence of her *laches*, to be held as having virtually released the estate of the deceased partner, she must nevertheless be held as having so done by her subsequent dealings with, amounting to the having given a new credit to, the survivors. Upon the same principle as in *Evans* v. *Drummond* (a), where two partners gave a joint bill of exchange for a partnership demand, and, when it became due, the holder took the separate bill of the continuing partner; he was held to have thereby discharged the estate of the other; for it was a reliance on the sole security of the continuing partner.

(a) 4 Esp. N. P. Rep. 89.

1816.

DEVAYNES
v.
NOBLE, &c.

SLEECH'S CASE.

In the present case, the Master has stated it as a matter of fact, that the several customers (including, of course, this claimant,) did, after the death of *Devaynes*, continue to deal with, and employ the survivors as their bankers. This, therefore, was a fresh contract with the four persons constituting the new firm, that they should hold the money deposited with them upon the same terms as it was held by the five persons constituting the old firm. It was an act unequivocally amounting to a recognition of the four as their debtors, in discharge of the deceased partner. And this act of recognition is a circumstance which distinguishes the present from all the cases that can be cited in support of the alleged general principle.—In *Heath* v. *Percival*, it was argued that there was a new contract; but the Court held the variation was not sufficient to make it so, the special contract, which was the foundation of the debt, remaining uncancelled in the hands of the obligee. *Bishop* v. *Church* was a case of relief upon the ground of mistake in the nature of the security; and *Thomas* v. *Fraser* (a) was of the same description. So also, *Burn* v. *Burn* (b). These cases cannot, in any manner, affect the present; and the principle which governs them is extended in others to securities by simple contract. In all cases where a security, whether special or otherwise, is taken for a debt, without further circumstances, the Court presumes it to have been the intention of the parties to give and take the best—that is, a joint and several security. This is the doctrine established by *Lane* v. *Williams*, *Daniel* v. *Cross*, &c. There is only one case which gives the least sanction to the demand in the present instance; and that is *Stephenson* v. *Chis-*

(a) 3 Ves. 399. (b) 3 Ves. 566.

*well*(c): but this, also, will be found very different in all the circumstances which can entitle a creditor to relief. In that case the creditors did not seek any direct relief against the estate of *Chiswell;* and Lord *Rosslyn* was not founded by any previous decision in the *dictum* which he threw out, that they had a right in equity to go immediately upon the estate of *Chiswell*, if they thought fit. That *dictum* was, however, subsequently acted upon; and in the case of *Gray* v. *Chiswell*(a), the present Lord *Chancellor* felt himself exceedingly embarrassed by it, expressly recognizing the distinction here taken between this case, and the cases of mistake in the nature of the securities, *viz.* that the latter class of cases proceeds entirely on the ground of intention. There, however, the only question being whether the joint and separate creditors should come in *pari passu*, and that question being decided in favour of the separate creditors, there was no party interested in contending that the joint creditors should not come in at all, even after the separate creditors had been satisfied; and, besides, in that case, the principal feature which distinguishes the present was wanting; for there, not an hour's credit had been given by the creditors to the surviving partner, whose bankruptcy followed instantaneously on the death of *Chiswell*. That case, therefore, anomalous as it is in itself, is no authority whatever for the present. It never can be the rule of the Court that no length of acquiescence shall be a bar to the demand,—that no acts of the creditor shall suffice to preclude him from seeking this relief against the estate of a deceased partner. But, if any limit is to be established, where can it be looked for more consistently than in the analogies already insisted on?

(a) 3 Ves. 573 (b) 9 Ves. 118.

1816.
DEVAYNES v. NOBLE, &c.
SLEECH'S CASE.

Another point in the case, which has not before been noticed, is that Miss *Sleech* has signed the certificate of the surviving partners; and she so signed it before she attempted to call on the estate of the deceased partner. Now, as the surviving partners were the primary debtors, we submit that the discharge of *their* estate must be held to operate as a bar, both at law and in equity, against the demand on the representatives of *Devaynes*, upon the principle that that which discharges one partner discharges the firm. But for the statute of *Anne* (*a*), that principle would have operated to discharge *Devaynes* himself, had he been alive and solvent; and the statute, which is meant to prevent this operation in the case of a living partner who is solvent, does not extend to the representatives of a deceased partner.

*For the Master's Report.*

*July* 17, 18.

Three points have been made in support of these exceptions.

*First*, That the Court has never interfered,—or, if it has, that it has improperly interfered,—to make the assets of a deceased partner liable for the debts of the firm.

*Secondly*, That, even supposing that to be the law of the Court with respect to ordinary partnerships in trade, the case of a banking-house is different, being governed by a custom peculiar to itself.

(*a*) 10 Ann. c. 15. s. 3.

1816.

DEVAYNES
*v.*
NOBLE, &c.

SLEECH'S CASE.

*Thirdly*, Supposing both the former propositions to be untenable, then that, in this individual case, the subsequent dealings and transactions have been such as amount to a release of *Devaynes*'s estate.

As to the two first points, the Decree has disposed of them; for, supposing the creditors to have no right in equity, upon general principle, to come on the estate of a deceased partner in a banking-house on the insolvency of the surviving partners, the Bill filed by Sir *Thomas Baring*, on behalf of himself and all other creditors of the partnership, ought to have been dismissed at the hearing; it appearing upon the record, both that the house was a banking-house, and that nine months had elapsed between the death of *Devaynes* and the bankruptcy of the survivors. The decree accordingly proceeds upon the principle that the estate is *primâ facie* liable, and that it only depends on the nature of the subsequent dealings and transactions, whether its liability has been discharged. To this, as the only true point in the case, therefore, it will be enough to confine our attention; only premising that the general rule is admitted by the Lord *Chancellor* to be established, although he expresses some surprise how it should have come to be so (*a*).

Three grounds are taken for contending that the estate has been released.

*First*, The time that has elapsed.

*Secondly*, The check drawn.

*Thirdly*, The certificate signed.

(*a*) In Ex parte *Kendal*, *ub. sup.*

1816.

DEVAYNES
v.
NOBLE, &c.

SLEECH'S CASE.

As to the first, that also was open to have been contended at the hearing. If the period of nine months did not appear on the record, it was at least clear that there had been an acquiescence of more than twenty-four hours, the period within which the claim ought, by analogy to the case of the drawer and acceptor of a bill of exchange, to have been instituted. If the demand had been legal instead of equitable, it could only have been barred by the statute of Limitations; and the only bar to an equitable debt is by analogy to that statute. If the rule be, that all the creditors of a banking-house must, immediately on the death of a partner, draw out their balances, there is no house so solvent that it could stand such a sudden run upon its credit. The money is advanced upon the joint credit of all the partners. All have derived more or less benefit from it, and the question of more or less is what the Court will not enter into. Therefore, though your contract is joint at law, in equity it is joint and several. Consequently, the estate of one of the partners dying cannot be discharged till all the debts are paid; and no length of time can operate as a bar to the demand, but that which would have so operated in the case of a legal debt.

Then comes the circumstance of Miss *Sleech* having drawn a check upon the house, under the name of the old firm, after *Devaynes*'s death. Whether she had or had not notice of *Devaynes*'s death, is, in our view of this question, perfectly immaterial. But, in point of fact, the Master has found that Miss *Sleech* had actual notice at the time she drew this check. By this act, undoubtedly, she recognizes the surviving partners as her debtors.—But upon what principle can it be said that, in so recognizing, she adopts them as such

debtors in discharge of the estate of a deceased person who was her debtor jointly with them?

In the cases of principal and surety, the meaning of "giving time to the principal," whereby the surety is discharged, is the entering into an engagement by virtue of which the creditor is not to call upon the principal for a certain fixed period; and this, it has been justly held, is contrary to good faith with the surety, and discharges him. But in no other case is the surety discharged. What has that to do with the present?—*Heath* v. *Percival* (a), *Daniel* v. *Cross* (b), and a late case of *Orr* v. *Chase* (c), before the *Vice-Chancellor*, sufficiently lay down the principle as to what are the subsequent dealings and transactions which entitle a party to say that his estate is released. They are only such as clearly demonstrate the intention of the creditor to give credit to the surviving partners exclusively.

But this is not the case of a surety. *Devaynes* was jointly liable with the other partners, by the original contract. At law, his liability is gone; but his estate continues subject, in equity, by force of that original contract. Neither is it the case of a bailment. Money may be deposited so as to be the subject of bailment; but, in order to constitute it such, the contract must be to return it in specie. True, the party depositing receives no interest for his money; but he has transferred the beneficial use of it to the party with whom it is placed, commuting his own beneficial use for the convenience of drawing it out as he has occasion.

(a) 1 P. W. 683.

(b) 3 Ves. 277.

(c) See post. a note of the case here referred to.

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

In *Primrose* v. *Bromley* (a), Lord *Hardwicke* refers to a case, as having been decided by himself, where there were two persons jointly bound, and one died. At law, he says, the bond might have been put in suit against the survivors: "but, as I thought it extremely hard, I decreed, the representative of the coobligor should be charged *pari passu* with the surviving obligor in the payment of the bond (b).

With regard to Miss *Sleech* having signed the certificate; in every case of this nature, before the question can arise whether that act will operate as a discharge of the solvent partner's estate, the parties must be brought into the situation of principal and surety. In this case, the Master has not found that the house was solvent at the time of *Devaynes*'s death; and this fact, which is assumed on the other side, rests absolutely on no foundation. The Master only says that the house continued in good credit to a subsequent period. But so it may have done, and yet have been all the time actually insolvent. The statute of *Anne* is expressly intended to prevent the certificate from operating in such a case as the present. It says, not only that those who were partners at the time of the bankruptcy shall not be discharged, but those who were under joint obligations at that time shall not be discharged by the signing of each other's certificate. And the policy of the statute must be taken to extend it as much to the case of a joint obligation in equity as at law.

(a) 1 Atk. 90.

(b) This must have been on the ground of *mistake* in the nature of the security. See also, *Simpson* v. *Vaughan*, 2 Atk. 31, 33.

1816.
DEVAYNES
v.
NOBLE, &c.
SLEECH'S CASE.
*July* 18.

*Hart*, in reply

...mitting, as I conceive we are bound to admit the principle, that, although a joint debt survives at law, in equity the estate of a deceased partner continues liable, nothing has been said to shew that this is an invariable rule, or incapable of being rebutted by the particular circumstances attending the relative situation and conduct of the creditors, and of the representatives of the deceased partner, the nature of the original engagement, and the object and purposes for which it was made and entered into. On this latter point, no answer has been attempted to the distinction taken between the case of a banking-house, and of an ordinary commercial partnership. In one sense, undoubtedly, the banker is a debtor to his customer; but it is a species of debt contracted on the ground of *mutual* faith and confidence, that the entirety of the money shall be ready at a certain place, and at a certain moment; and it is on the ground of this peculiar confidence, that the customer who so deposits his money, does it without the reservation of interest for the use of it. On the same ground, a man depositing money with a number of persons constituting the firm of a banking-house, does it in the confidence, that, if one should happen to die, his representatives will not interfere to disturb the joint fund out of which his money is payable; and, upon the same understanding, the survivors say to the representatives of the deceased, It is not your business to look to the application of these funds. The persons who have deposited them know that your Testator is no longer in the firm, but adopt us, the survivors, giving us a mandate to hold the balances to their use.

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

But, admitting that the estate of the deceased continues liable until the creditors have, by their conduct, manifested their intention to transfer that liability to the survivors, and that the mere circumstance of acquiescence, or neglecting to call for their balances, during the period of a few months after the death of the deceased, is not sufficient to raise that manifestation of intention, the moment that a party becomes active in indicating such an intention, a very different complexion is given to the case; and this is what we contend that Miss *Sleech* has done by drawing the check on the surviving partners. Now, suppose that when this draft was presented for payment by a customer having a large balance still remaining in their hands, the Executors of the deceased partner had interposed to stop the payment of it, saying, that their Testator's estate was interested; and that *they* must be first satisfied that the funds are not only sufficient, but are in a course of due administration according to the nature and priority of the demands upon them. What would the customer answer to this? Would he not say, I drew this draft, knowing that your Testator was dead, knowing also that my balance is in the hands of his surviving partners. I drew it upon the confidence of our original agreement, which was, that the money should be forth-coming the moment I think proper to demand it:—I look to *them* for the payment of it:—and what right have *you* to interfere? It is thus that ruin might possibly be brought upon a solvent house, merely because there is a demur on the part of those who have undertaken to have the money ready, and to pay it the instant it is called for.

In a case of this nature, however, the general and established usage may, perhaps, speak still more plainly than either the particular circumstances of con-

duct pursued by the parties, or the precise terms of the original contract. It is not the usage, on the death of a partner in a banking-house, for his Executors to look over the books of the partnership in order to see who are the customers, and to call upon them either to draw out their balances, or relinquish their claim upon the deceased's estate. Why is that not the usage? Because, the instant a customer knows that one of the partners has left the firm, that instant it would behove him to call for his balance; and, if he omits to do so, he immediately acquiesces in its remaining in the hands of the survivors, and adopts those survivors as his debtors.

Upon these grounds, as well as upon the strong language of Lord *Eldon* in Ex parte *Kendal* (a), we rest our case. It is not fair to resort to the decree as having disposed of any part of the present question, since the decree was necessary in order to have the benefit of the Master's judgment; and it was certainly the intention of the Court in pronouncing it to leave every point of law open for argument.

*The* MASTER *of the* ROLLS.

*July* 22.

The common law only partially adopts the *Lex Mercatoria* in respect of partnerships in

It can hardly be necessary in this case to enter into a detailed consideration of the ground and origin of the equity on which the claim of the creditor is founded.—The Decree assumes its existence, and has directed certain enquiries, the object of which was to ascertain whether that equity be affected by any thing that has

(a) 17 Ves. 514.

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

trade, holding that there is no survivorship, in respect of interest, in such partnerships, but that in respect of partnership contracts the obligation is joint, and attaches exclusively on the survivors. Relief in equity upon joint bonds, given on the ground of mistake.

passed subsequently to Mr. *Devaynes*'s death. It may be proper, however, to observe, that the common law, though it professes to adopt the *Lex Mercatoria*, has not adopted it throughout in what relates to partnership in trade. It holds, indeed, that although partners are in the nature of joint tenants, there shall be no survivorship between them in point of interest, yet, with regard to partnership contracts, it applies its own peculiar rule; and, because they are in form joint, holds them to produce only a joint obligation, which consequently attaches exclusively upon the survivors: whereas, I apprehend, by the general mercantile law, a partnership contract is several as well as joint. That may probably be the reason why Courts of Equity have considered joint contracts of this sort, (that is, joint in form,) as standing on a different footing from others.—The cases of relief on joint bonds may be accounted for on the ground of mistake in the manner of framing the instrument; and it may be said that equity gives to them no other effect than it was the intention of the parties themselves to have given to them. But how is it possible to explain the cases upon partnership notes, so as to distinguish them from ordinary partnership debts?

In the case of *Lane* v. *Williams* (a), the ground of the decree was, not that the partnership had given a note, but that the note was given for a partnership debt. It was, not that the note was, either in its form, or in the intention of the parties, to be considered as the separate note of each; and, least of all, as the separate note of *Williams*, who knew nothing of the occasion of giving it, but the declaration in the decree,

(a) 2 Vern. 277. 292.

(as taken by Mr. *Raithby* from the Register's book,) was "that *Richard Newberry*, and the Defendant *Williams's* Intestate, being partners at the time of borrowing the money and giving the note in question, and the said money being lent on the credit of such partnership, that either of the said partners was liable to pay the same." Then it adds, "and the rather, for that the Defendant *Williams* took such bond from *Newberry*, as aforesaid." That circumstance is stated as corroborating the equity in the particular case, but not as the ground of it, because it is explicitly declared that *quâ* partners, they were, each of them, liable for the partnership debt.

In *Bishop* v. *Church* (*a*), though Lord *Hardwicke* doubted a little, at first, whether it sufficiently appeared that the bond was intended to be separate as well as joint; yet, when it was ascertained that the money had been borrowed in the course of the partnership dealing, he thought the equity was perfectly clear. So in *Jacomb* v. *Harwood* (*b*), it is evident that Sir *John Strange* was of opinion that the estates of both partners were liable to the payment of the note, though it was not necessary to resort to that equity in the particular case, inasmuch as the surviving partner, being the Executor of the deceased partner, had executed a mortgage to secure the debt, which it was held to be within his competency to do.

In *Daniel* v. *Cross* (*c*), no doubt whatever appears to have been suggested with regard to this equity. The only question was, whether it had been waived by the subsequent dealings with the new house.

(*a*) 3 Atk. 691. 2 Ves. 100—371.

(*b*) 2 Ves. 265.

(*c*) 2 Ves. jun. 277.

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

It is true, in Ex parte *Kendal* (a), the *Lord Chancellor* expresses some surprise at the introduction of this equity; but I do not understand him to have intimated a doubt of its existence. Indeed his lordship acted on it in *Gray* v. *Chiswell* (b); for, if the remedy had been extinct in equity, as it was at law, the joint creditors would have had no more right to come on the surplus of the effects than to share them with the separate creditors; yet, on the surplus they were admitted, and without regard to the manner in which their debts were constituted. In that case of Ex parte *Kendal*, the *Lord Chancellor* took it to be clear, that the only question which Mr. *Devaynes*'s representatives could make, was, whether these creditors had so dealt with the surviving partners as to make it inequitable in them to resort to his assets? Then, what is that sort of dealing by which this effect is to be produced? I apprehend it must be something very different from what has taken place in Miss *Sleech*'s instance.

Equity of a creditor against the estate of a deceased partner not barred by eight months non-claim and payment in part by the surviving partners.

It is contended by the representatives of Mr. *Devaynes*, that Miss *Sleech* has lost her remedy against his estate, merely by not having prosecuted her demand in the interval between his death and the bankruptcy of the surviving partners; which is a period of about eight months. All that has passed in her case is, that she has received a payment of a part of her debt, and that she has taken no step for the recovery of the remainder of it. Now, if the equity stands upon any principle, upon what assignable principle can it be barred by this short arbitrary limitation? Upon what authority can a creditor be told, that the estate of Mr. *Devaynes* was, at the moment after his death, liable to

(a) 17 Ves. 514. (b) 9 Ves. 118.

1816.

Devaynes v. Noble, &c.

Sleech's case.

his demand; but that he has no longer any claim upon that estate, even although in the mean time there should have been no dealing whatever between him and the surviving partners? In the case of *Lane* v. *Williams* (a), there was certainly a much greater *laches*, if *laches* it is to be called; and the hardship that is insisted upon in this case, was strongly complained of there;—of letting in the demand of a creditor upon the separate estate of the deceased partner after such a length of time; for the defendant, besides insisting that it did not appear that *Williams* was privy or consenting to the borrowing of this money, or that it was brought into stock, or used in the trade, further insisted that, had the Plaintiff demanded it in the life-time of *Newberry*, who was the surviving partner, or before his estate was wasted, and his assets exhausted, she, the Defendant, might have had recourse to the bond of co-partnership, to repair the loss sustained by *Newberry*'s taking up the money and giving such note without the consent or privity of her husband: but she, (his representative,) had lost her remedy by the Plaintiff's *laches* in not demanding the debt sooner, and therefore the Plaintiff ought not to have the assistance of a Court of Equity to charge her. This, however, was urged in vain. The Court said, very nearly in the terms I have already stated from the decree, that, "the money being paid at the shop, the note of one partner binds both: and, though at law the note stands good only against the Executor of the surviving partner, (who was *Newberry*,) who received the money, and signed the note, yet it was proper in equity to follow the estate of *Williams* for satisfaction."

In the case of *Daniel* v. *Cross* (b), the partnership

(a) 2 Vern. 277, 292. (b) 3 Ves. jun. 277.

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

had been dissolved in the month of *March*, 1791. The Testator died in *June*, 1791. Advertisements had been published for all the creditors to come in and claim their debts upon his estate. The bankruptcy of the new house did not happen till the month of *March*, 1793; and yet it was hardly contended that the lapse of time, from *June*, 1791, to *March*, 1793, was sufficient to exclude the claim upon the estate of the predeceased partner. The argument turned entirely upon the effect of the subsequent dealings. I take it, that it must therefore, upon the authority of these cases, and upon general principles, be held, that, in the case of an ordinary partnership, it is impossible to say that Miss *Sleech* has been guilty of such laches as to preclude her from such remedy as she originally had against Mr. *Devaynes*'s estate.

No difference, in principle, between the case of a banking-house and any other partnership as to the equity of the creditor against the deceased partner's estate. Money paid into a banker's constitutes a debt, not a deposit. A creditor's leaving money in the hands of the surviving partners in a bank, does not consti-

But it is supposed that there is a considerable difference between the case of bankers and that of any other partnership; and that it is impossible for the creditors of a banking-shop to permit their money to remain in the hands of the surviving partners for such a space of time as eight months,—(indeed, the argument went to eight days, or even to a shorter period,)—without recognizing those surviving partners to be the depositaries of the balance due, and therefore exclusively responsible to make what is called the deposit forth-coming. There is a fallacy in likening the dealings of a banker to the case of a deposit, to which, in legal effect, they have no sort of resemblance. Money paid into a banker's becomes immediately a part of his general assets; and he is merely a debtor for the amount. Therefore, when a man lodges money with a partnership of bankers, he is as much concerned to look to the solvency of each particular partner, as if he was lending the money to any other partnership. The

SLEECH'S CASE.

money, in each case, equally ceases to be his the moment he has parted with it, and he has only to trust, for the return of it, to the solvency of the persons into whose hands it passes: but he has, in each case alike, the credit, and the responsibility of all the partners in the firm. Then, when one partner dies, what is to be inferred from the mere circumstance of allowing the debt upon the banking account to remain uncalled for in the hands of the surviving partners, beyond what would be inferred from not immediately calling in any debt due by the surviving partners, in any other trade, where money had been advanced or lent to that partnership? The security is permitted to stand just as it did, the party doing nothing to alter it. There is no *novatio debiti*—no new contract—no relinquishment of the old security, whatever it may, either in law or equity, be defined to be.

tute a new contract, nor operate as a relinquishment of the old security.

Then it is supposed that there is a rule of convenience, which requires that the creditors of a banking-house shall make their demand for their balances upon the surviving partners within some very short period of time, or else be held to have waived their recourse against the estate of the deceased partner. Now, I doubt whether the estate of a deceased partner would, upon the whole, be much benefited by the establishment of such a rule. For, if creditors were told that the only way in which they could preserve their recourse against the estate of a deceased partner, is by using all possible diligence to compel an immediate payment by the surviving partners, of the whole of their balances; there are very few houses which could stand such a sudden and concurrent demand as that would necessarily bring upon them. A house might be reduced to a state of bankruptcy, which, in the ordinary course of business, would have been able to

No rule of convenience fixing any period within which a creditor of a banking-house not making his demand on the surviving partners, is held to have waived his equity against the estate of the deceased partner.

1816.

DEVAYNES v. NOBLE, &c.

SLEECH'S CASE.

fulfil all its engagements; and a demand would be brought on the estate of a deceased partner, from which it might otherwise have wholly escaped; and, therefore, if expediency were to be taken into the consideration, I do not see what purpose of general convenience would be answered by compelling creditors to such a rigorous course as the condition upon which alone the hold which equity gives them on the estate of a deceased partner could be retained.

Notice of the death of the deceased partner, whether before or after the creditor has received payment in part from the surviving partners, not material.

Creditor by drawing on the surviving partners recognizes them as his debtors, but not exclusively.

Then comes the question, whether, if Miss *Sleech* has not by her *non-feasance* lost her remedy against this estate, she has lost it by any thing she has actually done.—The first consideration is, whether the circumstance of her having called for, and received, a part of her balance, makes any difference.—Whether it was called for before or after she knew of Mr. *Devaynes*'s death is not, in my view of the case, at all material to the question. *Ex hypothesi*, the surviving partners are liable to the payment of this debt, and ought in the first instance to be called upon for the payment of it. How is it then, that a creditor, by acting upon that acknowledged liability, to the extent that his convenience and occasions may happen to require, is *quoad* the residue of his debt, to be placed in a worse situation, than he would have been *quoad* the whole, if he had demanded no part of it? Miss *Sleech*, by drawing a draft upon the surviving partners, recognizes them as her debtors. Such, undoubtedly, they were; but how does that affirmative act prove negatively that thenceforth no other persons were to be her debtors?

Creditor, signing certificate of surviv-

Another act, which is imputed to Miss *Sleech* as one which releases the Testator's estate, is, that she has signed the bankrupt's certificate. Now, I apprehend

1816.

DEVAYNES
v.
NOBLE, &c.

SLEECH'S CASE.

...ing partners, does not thereby release the estate of a deceased partner.

The statute gives the release, in consequence of the certified conformity of the bankrupt.

that that can amount to no release of the demand upon Mr. *Devaynes*'s estate. Supposing the 10th of *Anne* (a) had never passed, I do not conceive that the signing of a bankrupt's certificate could have operated as an ordinary release with regard to any third person; for it is the act of parliament that gives that release, in consequence of the certified conformity of the bankrupt to the requisitions of the bankrupt laws. A man, by signing a certificate, does not release his own debt, unless the requisite number of creditors afterwards sign; and, if they do sign, the debts of those who do not sign are as much released as the debts of those who do sign. If it were necessary to resort to the act, it appears to comprehend this case, as it extends to every case of joint-contract, or joint-obligation of any sort. Therefore, it appears to me, that Miss *Sleech* has not, in any way, released the demand which it is assumed by the decree, and clearly established by the authorities, that she had at the time of the death of Mr. *Devaynes*. I am consequently of opinion, that the report of the Master is right, and that the exception must be overruled.

(a) Stat. 10 *Ann.* c. 15. s. 3.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

The next class of creditors was represented by Mr. *Clayton*, and consisted of those who, after the death of *Devaynes*, continued to deal with the surviving partners both by drawing out and paying in money; payments being made by the surviving partners before they received any money of the creditors; and the balance, varying from time to time, sometimes increased, and sometimes diminished; but upon the whole considerably increased by the subsequent transactions.

In this case also, the creditor had deposited exchequer bills with the house, which exchequer bills were sold in *Devaynes*'s lifetime without the knowledge of the creditor, and the produce applied to meet the exigencies of the house; and the particular facts of the case, as appeared upon the Master's Report, were the following:—

Facts of the case.

At the death of *Devaynes*, *Clayton* had a balance of £1713 on his cash account with the banking-house. Prior to the death of *Devaynes*, he had deposited with the partners two exchequer bills for £500 each, without giving them any power or authority to sell or dispose of the same, except as it was mutually agreed and understood between him and them, that, when the exchequer bills should be paid off, they, the partners, were to buy with the produce, or take in exchange, other exchequer bills, to be held by them in the same manner. Contrary to this agreement or undertaking, and without the consent or knowledge of *Clayton*, the partners did, in the lifetime of *Devaynes*, (on the 19th of *June*, 1809,) sell these bills for £1035, which produce they applied to their own use. And of this transaction *Clayton* had no notice until after the bankruptcy of the surviving partners.

Between the death of *Devaynes* and the bankruptcy, the payments made to *Clayton* by the surviving partners exceeded the amount of the balance (£1717) and the produce of the exchequer bills (£1035) together; and the payments so made amounted to the sum of £1260, within a few days after *Devaynes*'s death, and before they had received any monies whatever. But their subsequent receipts largely exceeded the sums paid; and the balance due at the time of the bankruptcy (exclusive of the produce of the exchequer bills) exceeded the amount of the balance due at *Devaynes*'s death. And *Clayton*, having, since the bankruptcy, discovered that the exchequer bills had been sold, and not replaced, proved the amount of the balance, together with the produce of the bills, as a debt under the commission; and received dividends upon the same, but did not sign the certificate.

The Report went on to state that *Clayton*, residing at *Newcastle*, kept his accounts with the partnership according to the custom already explained, of bankers with their country customers. On the 30th of *March*, 1810, his account was made up and balanced by the surviving partners, and transmitted to him; and the balance was carried forward, and the account continued to the time of the bankruptcy. In the account so rendered, the proceeds of the exchequer bills were credited so as falsely to represent that they had been paid off by government on the 31st of *October*, 1809, the day at which they were payable, and that a new exchequer bill for £1000 had on the same day been purchased, or taken in exchange from government, in their stead; and *Clayton*, being deceived by such statement, did not learn the truth of the case till after the bankruptcy, as already mentioned.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

Under these circumstances Clayton claimed against the estate of *Devaynes* the sum of £1171 (as the residue of the balance of £1713, after deducting the amount of the dividends received thereon,) and the sum of £971 (as the value of the exchequer bills,) with interest, after deducting the amount of the dividends received in respect of the said exchequer bills. The circumstance of the notice given by *Clayton* and *Scott*, as solicitors for the Executors of *Devaynes*, to the surviving partners, "that the use of *Devaynes*'s name in the firm was without their consent," (which notice was so given without *Clayton*'s personal knowledge,) has been already detailed.

Master's Report.

On the subject of these claims, the Master reported his opinion to be—*First*, that the subsequent payments made by the surviving partners ought to be applied to the account of the cash balance due at the death of *Devaynes*; and that *Clayton* had, by his subsequent dealings and transactions with the surviving partners, released the estate of *Devaynes* from the payment of the said cash balance, and every part thereof. *Secondly*, that, with respect to the value of the exchequer bills, *Clayton* had not, by his said dealings and transactions, released the estate of *Devaynes* from the payment of the value thereof, and such interest as after mentioned. *Thirdly*, as to the mode of estimating the value, and computing the interest, that the mode of computation adopted by the claimant, (*viz.* by charging the actual amount of the proceeds on the 19th of *June*, 1809, and calculating interest on that amount from that time,) was erroneous, because, if the exchequer bills had not been sold, but kept and disposed of according to the agreement, the same, both principal and interest, would have been received on the 31st of *October*, 1809, and

the principal only invested in new exchequer bills bearing the same rate of interest, which was accordingly represented, (as aforesaid,) to have been actually done; and the Master was consequently of opinion, that *Devaynes*'s estate should be charged with interest, at the rate of £5 *per cent.*, only from the said 21st of *October*, 1809, in addition to the principal sum; and, having computed the same accordingly, found the sum of £885 to be the amount of such principal and interest, for which the estate of *Devaynes* still remained liable in respect of the said exchequer bills.

Exceptions.

To different branches of this report each of the parties took exceptions; *Clayton* contending that, with respect to the cash balances, the estate ought merely to be discharged to the extent of any such balance as was paid to his use, after giving him credit for the sums paid in, and deducting the amount of the drafts drawn by him, after the Testator's death; and, as to the interest on the exchequer bills, that the same ought to be allowed from the time when they were sold, and not only from the time when they would have been paid off by government; while the representatives of *Devaynes* disputed the claim to the exchequer bills altogether.

In the argument, it was thought most convenient to proceed, in the first place, upon the last of these exceptions.

*Hart*, *Wetherell*, and *Sidebottom*, *Martin* and *Hazlewood*, and *Abercromby*, for different parties in support of the exception.

*Third exception.*
*July* 18—22, 23.
Deposit with

The deposit of exchequer bills with a banker stands on a totally different footing from the deposit of money; for the former is a mere naked bailment, unaccompanied

1816.

DEVAYNES *v.* NOBLE, &c.

CLAYTON'S CASE.

the partnership of exchequer bills, which were sold in *D.*'s lifetime, and the produce applied to the use of the house. *D.*'s estate is responsible in respect of the breach of trust; and not discharged by subsequent acts from which an inference might be drawn of the creditor's adopting the surviving partners as his debtors.

with any advantage arising from the use of the thing deposited. The selling of these exchequer bills, before they became cash in the common course of payment, cannot in this Court be stated as any thing more than a breach of trust; for this Court is not competent to judge of questions of criminal jurisdiction. This constitutes the amount of the exchequer bills so sold a simple contract debt from the partnership to *Clayton*, and nothing further. This being the state of the transaction at the death of *Devaynes*, the first step taken by *Clayton*, he being at that time ignorant of the sale of the exchequer bills, is to give notice to the surviving partners, as solicitor for *Devaynes*'s representatives, not to continue *Devaynes*'s name in their firm; for this act, although really the act of his partner in the name of the partnership, is binding upon himself as a partner. *Alderson* v. *Pope* (*a*). The inference to be drawn from it is, that they consider the estate of the deceased as not to be resorted to; but that the house ought to be continued as the sole debtors. After giving this notice, whereby he has evidenced his intention that the acts of the surviving partners shall not be construed to affect the estate of the deceased, he continues his dealings with those surviving partners. He then receives from them an account whereby it is represented to him that the bills have been disposed of in the regular course, and new bills taken in exchange or purchased with the proceeds; and he adopts this account, and the representation contained in it, without further inquiry; so far releasing *Devaynes*'s estate by such adoption; because it is owing to his own *laches* that that estate is now sought to be charged with the amount of the proceeds.

If it should be said that, when Mr. *Clayton* adopted

(*a*) 1 Campb. 404.

the surviving partners as debtors, he did not mean so to adopt them as to the exchequer bills, which he supposed to remain in specie; yet if, when he is subsequently told that they no longer remain in specie, having been sold in the regular course of business at a period later than the death of the deceased partner, (even though that be a false representation as to the time and circumstances of the sale), and, if being so told, he acquiesces in the account rendered, and consents to the surviving partners continuing in possession of the proceeds of those exchequer bills, whether in the form of cash, or of new exchequer bills, how can it be pretended that, in so acquiescing, he retains any hold over the estate of *Devaynes*, which he has himself previously declared to be wholly unconnected with the partnership as to all subsequent dealings?

[It was also contended, that the sale of the exchequer bills appeared, upon the evidence, to be the act of the other partners without *Devaynes*'s concurrence; and moreover, that it amounted to a criminal offence, for which none can be chargeable but the individuals by whom the offence has been actually committed.

*Bell* and *Palmer*, for the Report.

A breach of trust always constitutes a joint and several debt, for which each of the parties continues liable. *Devaynes* was, therefore, answerable for the conduct of his partners in respect of these exchequer bills, and his estate still remains answerable. It appears from entries in their books, that the partnership had the advantage of the proceeds arising from the sale; and, whether *Devaynes* had any specific

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

knowledge of the transaction or not, is perfectly immaterial.

No *laches* is imputable to Mr. *Clayton*; for he knew nothing of the sale of these exchequer bills till after the bankruptcy. In the month of *October*, when the pretended exchange of old for new exchequer bills was represented to have taken place; *Devaynes* was still living. Consequently, that which is called the adoption by Mr. *Clayton* of this representation is also quite immaterial.

The inference from the notice given by *Scott*, in the name of Messrs. *Clayton* and *Scott*, as solicitors for the Executors, can hardly be set up against the fact that one of those Executors, being also one of the surviving partners, subsequently sent to *Clayton*, as partner, an account in the name of the firm which, as Executor, he had served himself and his co-partners with the notice no longer to use. But, supposing he were privy to this notice being given, the notice itself only extends to the future acts of the partnership. How can it operate to rid any of the partners from a responsibility arising out of past transactions? Then, with respect to what is treated as an adoption on the part of Mr. *Clayton* of the account afterwards transmitted to him, it is difficult to understand how any liability can be got rid of by a false representation.

*The* MASTER *of the* ROLLS.

*July* 23.

It appears to me that this transaction stands quite detached from any other, and may be decided by itself.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

The exchequer bills having been sold in Mr. *Devaynes*'s lifetime, contrary to the duty reposed in the partnership, and the money having been received by the partnership, the amount became a partnership debt, whether the individual partners were, or were not, privy to the sale. The debt accrued at the moment that the sale was made, and not at the time when the subsequent representation was given to Mr. *Clayton*, with respect to the re-investment of the money in other exchequer bills. How a falsehood told by the four could do away a previous breach of trust which had been committed by the five, I cannot comprehend. More than a breach of trust, I do not see how it can be reckoned. It was attempted to argue that it was a felony; but, in order to make the subsequent conversion of property, of which the possession has been delivered, amount to a criminal charge, it is necessary to shew that the *animus furandi* existed at the moment when the delivery was made. Taking this, therefore, to be a debt, as Mr. *Clayton* was altogether ignorant of its existence, he could not, by any subsequent dealings with the other partners, transfer it to their credit.

The amount of money received by the sale of the exchequer bills becomes a partnership debt, which accrued from the moment when they were sold without the consent of the creditor; and this, whether the individual partners were or were not privy to the sale. The sale of the exchequer bills amounts only to a breach of trust.

The notice, whatever operation it may have in any other question as between Mr. *Clayton* and the surviving partners, can have none in this case, in which he was ignorant that any such sum of money was in their hands. He was willing to trust them with the care of his exchequer bills; but, whether he would transfer to them exclusively the liability, which all had incurred, of answering for the produce of the sale, was a matter upon which he never had an opportunity of exercising any choice. For the same reason, some of the payments that were subsequently made, could not

Notice to the surviving partners given by a creditor of the partnership, as solicitor for the representatives of the deceased partner, that the estate of the deceased will not be liable for their future

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

operate in extinction of this debt. Mr. *Clayton* could not draw upon the credit of a fund which he did not know to exist; and, whatever question may arise as to the manner in which the payments are to be imputed, to the old or to the new cash balances, they must be imputed to acknowledged cash balances, of the one or the other description, and not to the produce of securities which the one party represented, and the other believed, to be still remaining in specie.

dealings, does not operate as discharging the estate from a debt previously incurred to that creditor, of which he was at the time ignorant. Payments subsequently made in respect of cash balances not to be taken as operating in extinction of such a debt.

I am, therefore, of opinion that this exception must be over-ruled.

*Second exception.*

*July* 23—30.

Interest upon the exchequer bills allowed, at £5 *per cent.*, from the time of the sale, upon the ground that the claimant had a right to consider it as a debt from that time, and had elected so to consider it.

The next of the exceptions which was argued, was that to the allowance of interest on the exchequer bills sold, only from the time when they would, in the regular course, have become payable by government, not from the time of sale.

*Bell* and *Palmer*, in support of the Exception,

Contended that this was a question long settled by the practice of the Court. That, whenever a person has been guilty of a breach of trust, the Court has always said, the *Cestuy que trust* has a right to have the subject of that breach of trust in the manner most beneficial to himself; that he has a right to consider it either as a debt, from the time the breach of trust took place, or to be made good in *specie*; and that Mr. *Clayton* had elected in the former branch of the al-

ternative. And they cited Earl *Powlett* v. *Herbert* (a), *Pocock* v. *Reddington* (b), *Long* v. *Stewart* (c), and *Bate* v. *Scales* (d).

*Hart*, *Wetherell*, and *Sidebottom*, and *Hazlewood*, for the Report.

We do not deny the principle that a Trustee shall make no advantage of his breach of trust; that the *Cestuy que* trust is entitled to an inquiry how the money was disposed of; and, if he can find that by replacing the stock he shall be benefited, that the stock shall either be replaced, or he shall have the value in money. But the question is, whether the circumstances of this case do not take it out of the general principle.

This claimant seeks to affect an innocent person by a breach of trust of which his partners have alone been guilty. In point of fact, it must be admitted that the partners of *Devaynes* sold these exchequer bills in the month of *June*, 1809. In *October*, 1809, they would have become payable in the regular course, and then the capital alone (amounting to £1000), would have been to be laid out in the purchase of new exchequer bills, the interest upon the old bills, to the amount of £30 or £40, being, according to the agreement or understanding stated in the report, to be retained by the bankers, as part of the cash balance in their hands, to answer the drafts of their customer. In *March*, 1810, they represented that they had in fact invested the

(a) 1 Ves. jun. 297.
(b) 5 Ves. 794.
(c) 5 Ves. 800, note.
(d) 12 Ves. 402. See also *Rocke* v. *Hart*, 11 Ves. 58. *Mosley* v. *Ward*, 11 Ves. 581.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

£1000, (which was false), and that they had (which was the truth) the amount of the interest in their hands as part of the cash balance. *Clayton* adopts this representation; and, by accepting the supposed investment, recognizes the fact that the interest is to be considered as part of the floating cash he had in their hands, of which he might at any time avail himself by drawing at sight. In truth, from the month of *October*, 1809, to the month of *March*, 1810, he must be considered as having constantly acted upon the supposition that this £30 or £40 formed a part of that floating balance. He drew upon the fund of which this constituted a part; and his drafts, during this period, were to an amount by many thousands of pounds exceeding it. True, he paid in other sums to supply his credit; but still he drew, in part, upon the credit of this £30 or £40. Now, however, the Court will, by every possible means, repress fraud, and take care that those who have been guilty of fraud shall derive no benefit from it; yet, as against an innocent partner, the Court will deal with him as with an ordinary creditor, and charge him no further than a mere creditor might have been charged.

In a very recent case of *Underwood* v. *Stevens* and *Smith* (a), in which *Stevens* had sold out bank annuities which produced 5 *per cent.*, and *Smith*, his co-executor, had concurred in that act, your Honor charged *Stevens* with the 5 *per cent.*; but, in animadverting on the conduct of *Smith*, who, though he had concurred in the act, was guilty only of *laches*, thought that he was chargeable only at the rate of £4 *per cent.* (b).

(a) At the Rolls, *July* 1816.

(b) Vide *Tebbs* v. *Carpenter*, Madd. 305, and cases there cited.

In the present case, the Master has placed Mr. *Clayton* in the precise situation in which he would have been if the breach of trust had not been committed, and it is not a case which calls for more than that.

The cases cited are cases in which stock had been sold; and this differs from the case of exchequer bills, in that stock is capable of being replaced in specie; but you cannot re-purchase the same exchequer bills, nor others precisely of the same description, and bearing the same rate of interest with the former.

*Bell*, in reply.

It is assumed that *Devaynes* was not privy to this transaction respecting the sale of the exchequer bills; but there is no evidence of this, and the contrary is most probable. However, he was a partner in the firm at the time when the Master finds, in general terms, that *the bankers* sold them out. It is entered in the books as the act of the partnership, and *Devaynes* continued a partner till his death, five months afterwards.

Suppose, in *Pocock* v. *Reddington* (a), it had been asked, where is the breach of trust, if we have replaced the stock and paid the dividends? The *Lord Chancellor* answers that question; for he says, that is nothing to the purpose. You shall not be allowed to say, True, I have been guilty of a breach of trust; but I will replace the stock, and pay the dividends, and so all will be right. You have put yourself in a dif-

(a) 5 Ves. 794.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

ferent situation; and they have a right to consider you as their debtor from the time the stock was sold out, and to have interest from that period.

But it is said Mr. *Clayton* had the benefit of the nominal interest carried to his account. The amount of the interest was £49; and *Clayton*'s account was never fully drawn within some hundreds, as will appear when we come to consider the next exception. Then have they a right to say he had the benefit of this sum which they carried to his account upon the footing of a pretended transaction? Have they a right to say, we have told you a falsehood, and therefore you shall not consider us as your debtors, as you otherwise might have done?

It is nothing that the bankers could not have purchased new exchequer bills to the precise amount of the old, together with the interest. They had funds in their hands to make up the amount required if necessary. The Master has not re-instated Mr. *Clayton*. He has only placed him in the situation in which he would have been if the exchequer bills had been sold in *October*. But this, as we contend, is precisely what the Master ought not to have done. *Clayton* had a right to say, I consider this as a debt, and that interest attaches to it, according to the principles of a Court of Equity, from the moment when it was incurred; that is, from the moment when the breach of trust was committed.

*The* MASTER *of the* ROLLS

Reserved the consideration of this point until he should be enabled to decide upon the subject of the

next exception. But, after that was disposed of, he said (*a*) that, with regard to this question of interest, he was of opinion, the interest should be computed upon the amount produced by the sale, from the period at which the money came into the hands of the partnership. He did not see how *Clayton*'s acquiescence in the account rendered could affect this claim. He acquiesced on the supposition that the account was true. Therefore, when it afterwards turns out that the bankers, instead of keeping the exchequer bills, sold them and used the money produced by the sale, he has a right to treat that as a debt from the time when it came into their hands, and to charge them with interest for the use of it. And he said that he so decided, not on the ground that Mr. *Clayton* was bound to take it as a debt, but on the ground that he had elected to take it as such.

Exception allowed.

*First exception. July 23, 24—26.*

On the subject of the first Exception, (which came on to be argued last in order,) it is only necessary to recapitulate the following facts:—

Creditors who, after *D.*'s death, continued to deal with the surviving partners by drawing out and paying in; but having

At the death of *Devaynes*, *Clayton*'s cash balance in the hands of the partnership amounted to £1713, and a fraction.

After the death of *Devaynes*, and before *Clayton* paid in any further sums to his account with the bankers, he drew out of the house sums to the amount

(*a*) *July* 30.

1816.

DEVAYNES *v.* NOBLE, &c.

CLAYTON'S CASE.

of £1260, thereby reducing his cash balance to £453 and a fraction.

From this time to the bankruptcy, *Clayton* both paid in and drew out considerable sums; but his payments were so much larger than his receipts, that at the time of the bankruptcy, his cash balance, in the hands of the surviving partners, exceeded £1713, the amount of the cash balance at *Devaynes*'s death. (And this, exclusively of the exchequer bills and their produce, which were put out of the question in the consideration of this exception.)

drawn sums out before they paid any in; the balance varying from time to time, but being upon the whole *increased* by such subsequent dealings. The subsequent payments by the surviving partners must be taken in reduction of the balance due at *D.*'s death; and his estate held discharged *pro tanto.*

By the amount of the dividends received since the bankruptcy, (those dividends being apportioned to the whole debt proved under the commission,) the balance of £1713 would be reduced to £1171 and a fraction; and it was this last sum which *Clayton* claimed against *Devaynes*'s estate, and as to which the Master had reported that *Clayton* had, by his subsequent dealings with the surviving partners, released the said estate.

But now, upon the argument of the exception, and in consequence of the decision in Miss *Sleech*'s case, that claim was abandoned, to the whole extent of the cash balance at *Devaynes*'s death above £453, the sum to which it had been reduced by drafts upon the house previous to any fresh payments made to it; and that which was now claimed is the last mentioned sum of £453, *minus* its proportion of the dividends.

*Bell* and *Palmer*, *Fonblanque* and *Clayton*, in support of the exception.

This is a case, the decision of which will be of the greater importance, as it has lately been one of frequent occurrence, and has never been decided, either at law or in equity. Suppose that, in this case, *Devaynes*, instead of dying, had merely quitted the partnership; and that public notice had been given of that event, tantamount to the notice afforded by the advertisement of his death in the newspapers; and that the same transactions had taken place with the continuing partners which have now taken place with the surviving partners. In such case, the question would have been a mere legal question; and what we submit is, that in such a case, the retiring partner would clearly be liable to the extent of the £453; and, if so, then that, in the present case, the rule of equity is strictly analogous to the rule of law.

If this view be correct, then all that remains to be considered is, whether there are here any special circumstances which would, in the case we are supposing, have discharged the legal liability.

The legal principle is that which is laid down in *Bois* v. *Cranfield* (a), and appears to be this; *viz.* that, if a man owes another two debts, upon two distinct causes, and pays him a sum of money, he (the payor) has a right to say to which account the money so paid is to be appropriated.

Then follows *Heyward* v. *Lomax* (b), deciding that, if a man, owing another money on a security carrying interest, and also on simple contract, pays money generally, without specifying on what specific account, it

(a) Styles 239. Vin. Ab. title Payment, M. pl. 1.

(b) 1 Vern. 24.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

shall be taken to the advantage of the payor, in discharge of the debt carrying interest. This, however, has been over-ruled by subsequent cases.

The next is *Perris* v. *Roberts* (*a*), where, there being a mortgage debt, and also a debt by simple contract, and both being cast into one stated account, and a bill of sale made for securing the balance, which proved deficient, the payment was decreed to be apportioned. In this case there were strong circumstances to have exonerated the debtor altogether.

In *Manning* v. *Weston* (*b*), however, the rule is strictly brought back within its former limits. There, a man indebted both by specialty and by simple contract, having made payments and entered them in his book as made on account of what was due by specialty, this was held not a sufficient appropriation; and the *Lord Chancellor* said, that the rule of law, "Quicquid solvitur solvitur secundum modum solventis," is to be understood only when, at the time of payment, the payor declares the purpose. If he does not, the payee may direct how it shall be applied. See to the same purpose, an anonymous case in second Modern Reports (*c*), and *Bowes* v. *Lucas* (*d*).

*Meggott* v. *Mills* (*e*) must also be mentioned, because that is a case on which some stress will probably be laid. Lord *C. J. Holt* there expressed it to be his opinion that, where two sums were due, one of which might make the debtor a bankrupt, and the other, (being a debt incurred after he ceased to trade) could

(*a*) 1 Vern. 34.
(*b*) 2 Vern. 606.
(*c*) 2 Mod. 236.
(*d*) Andrews 55.
(*e*) Ld. Raym. 287.

not produce that consequence, the payment should be taken without more, as meant to be applied to the former debt. But this opinion of Lord *Holt's* has since been called in question.

*Goddard* v. *Cox* (a) is next in order of time, and has been considered as a ruling case ever since its decision. There, a widow, being indebted as Executrix to her deceased husband, became also indebted on her own account, and afterwards married again, and her second husband became also indebted on his own account, and made payments without declaring the purpose. It was agreed that he had the first right to appropriate his payments; but, having neglected it, that it devolved on the payee, who might apply them as he pleased either to the debt incurred by the wife *dum sola*, for which the husband was answerable, or to the husband's own debt, but not to the debt of the wife as Executrix. And a case of *Bloss* and *Cutting* was there cited, to the same effect as *Manning* v. *Weston*, and the rest.

The next case is *Hammersly* v. *Knowlys* (b), which would have been against us if we had contended for the whole amount of *Clayton*'s claim; but, taking it at the lesser sum only, is in our favour. In that case, Lord *Kenyon* held that, the note of *A.* being deposited by *B.* at his banker's, as a security for money, the bankers knowing that it was an accommodation note, and *B.* afterwards paying money to his bankers without any specific appropriation, the money must be placed as far as it would go in discharge of the then existing debt, and the banker could not make the maker of the note responsible for more than the

(a) 2 Stra. 1194. (b) 2 Esp. 665.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

balance remaining due at the time of such payment, although he afterwards trusted his debtor with a further sum of money.

Then comes *Dawe* v. *Holdsworth* (a), which was an action of trover. The defence was bankruptcy; and the question arose, as it did in the case in Lord *Raymond*, whether the petitioning creditor's debt could be established by reason of the bankruptcy? To establish the bankruptcy, the Defendant proved that *Pittard* was a trader, and so continued till 1785, when he became indebted to one creditor in £200, upon whose petition the commission issued. This debt was originally a simple contract debt, but a bond was given after he had ceased to be a trader; and Lord *Kenyon* held that the question was, not when the bond was given, but when the debt was contracted. There had been dealings between the bankrupt and the petitioning creditor since he ceased to be a trader, and it proved that, though at the time the commission issued, there was a larger balance than £200 due to the creditor, yet more than £200 had also been paid on account between the time when the trading ceased and the issuing of the commission. Lord *Kenyon* further held that, as no particular directions had been given for the application of the money paid on account, it must be placed to pay off the old debt first. Consequently, no part of the debt contracted while *Pittard* was a trader remained due when the commission issued; and the commission itself was therefore unsupported.

Now, *primâ facie*, this seems to be an authority unfavourable to us. But in *Peters* v. *Anderson* (b),

(a) *Peake* N. P. 64. (b) 5 Taunt. 596.

after all the cases on the subject had been fully gone through, it was laid down that, although the payor may apply his payment to which of two or more accounts he pleases, and although his election may be either expressed or inferred from the circumstances of the transaction; yet, if not paid specifically, the receiver might afterwards appropriate the payment to the discharge of either account as he pleases. And Lord *C. J. Gibbs*, referring to the cases of *Meggott* v. *Mills*, and *Dawe* v. *Holdsworth*, observes that, in both, the debts arose on the same account, and it was totally immaterial to which end of the account the payment should be applied; but that Lord *C. J. Holt*, and after him Lord *Kenyon*, went upon this ground, that it would be too hard if a man, having made a payment sufficient to exempt him from the operation of the bankrupt laws, should not have the benefit of paying off that part of his debt which subjected him to their operation. "It is an exception," he said, "and founded on the circumstance of bankruptcy."

There is one more case of *Newmarch* v. *Clay* (*a*), where Lord *Ellenborough* said, there might be a special application of a payment made, arising out of the nature of the transaction, though not expressed at the time in terms by the party making it. And he said, the payment in that case was evidenced by the conduct of the parties to have been made for the purpose of taking up the bills which had been antecedently dishonoured; for that, upon receiving that payment, the dishonoured bills were delivered up. And, upon that ground, the Court of K. B. were of opinion there ought to be a new trial; the present Lord Chief Baron having previously decided it upon the general

(*a*) 14 East 239.

principle that, where there is no express appropriation, the payee has a right to apply the payment at his own option; which general principle is also admitted by the very ground on which the Court of K. B. granted the new trial. Upon this, therefore, the doctrine of Courts of common law rests at the present day.

Now, to apply this doctrine to the circumstances of the present case. In none of those cited does it appear that the payee had actually appropriated the payments made until the matter came into question; and the last case of *Newmarch* v. *Clay* (as well as the principle of *Goddard* v. *Cox*) shew that the doctrine applies equally in the case of a partnership. Then it is shewn that the Court may, from circumstances, infer the intention to apply a payment in discharge of the old debt;—but what were the circumstances from which that inference was drawn in the case referred to? They were of such a nature that no doubt could arise respecting their tendency. Accordingly, the counsel acquiesced immediately, and did not even urge an inquiry. The case of *Dawe* v. *Holdsworth* proves, what we do not mean to dispute, that, when the old debt is completely discharged, the payments subsequently made must be applied in discharge of the new debt. This is the only case in which we hear of applying the payments to a first debt in priority to a subsequent debt; and this is the case which, Lord *C. J. Gibbs* afterwards says, was rightly decided, upon the principle that one debt would have exposed the party to a commission of bankruptcy, stating that "it is an exception founded on the circumstance of bankruptcy."

Now, still considering the present case as involving the legal question, let us suppose that *Devaynes* retired from the partnership in *November* 1809, from

that time till the commission issued in *July* 1810, Mr. *Clayton* continued to deal with the house both by paying in and drawing out; and, in making his payments, he had a right to apply them to whatever demand he thought proper. But it is said there are special circumstances. What are they?—First, That Mr. *Clayton*'s partner gave notice to the house that *Devaynes* would have nothing more to do with the house. What would be the effect at law, of such a notice? Does it discharge the debt? A release cannot be by parol. How then could the debt be discharged? Not by the subsequent payments; for, those payments being made generally, the payee had a right to attribute them to whatever account he pleased. In fact, there was no payment made to the account of the old debt, except as it was actually reduced on the entire balance. Then was it in any manner altered in consequence of *Clayton*'s accepting the new house as his debtors? He never did accept them as his debtors, any otherwise than as they were, and continued to be his debtors in law. But he never, by any acts of his, specifically accepted them as such. This might have been more strongly urged in *Newmarch* v. *Clay*. *Devaynes*'s Executors could not, by giving notice, withdraw themselves from their responsibility. Then what does the notice amount to? Besides, notice to a partner does not bind, except in the case of a co-partnership transaction; and, therefore, even if this notice could operate as a discharge, (but which it cannot,) if both had been privy to it, it could not at all events have any effect whatever on Mr. *Clayton*.

Then there is the circumstance of the account delivered in *March* 1814. What conclusion can be drawn from that circumstance? *Clayton* had con-

1816.

Devaynes v. Noble, &c.

Clayton's case.

tinued to deal with the house; so had the parties in *Newmarch* v. *Clay*. So they had in *Meggott* v. *Mills*, and in *Peters* v. *Anderson*. There can be no distinction between a banking co-partnership and any other co-partnership. The question is, was the sending this account any admission by *Clayton* that, so far as his debt had not been paid, he considered this account as a payment? The proper way to try this would be by supposing that the account consisted only of sums drawn out. And this, as your Honour has already decided in Miss *Sleech*'s case, would not have operated in discharge. Does the circumstance of the creditor having paid in, as well as drawn out, make any distinction? It proves that he credited the house for the terms so paid in, not that he credited it for an already existing debt of *Devaynes*: that remains just as it did before. Upon that security he rested, and had a right to rest.

So it would be at law, if *Devaynes* had only *retired* from the partnership. What then discharges his estate in equity? We have already your Honour's opinion that, although in this case it is a mere equitable demand, yet it is an equity founded upon the principles of law; and, if so, it is impossible to conceive of any defence in equity that would not have been an available defence at law, supposing the circumstances of the case were such as to constitute it a legal demand instead of an equitable.

(The following cases were also cited in support of this exception. *Wilkinson* v. *Sterne* (*a*), *Hall* v. *Wood* (*b*), *Kerby* v. Duke of *Marlborough* (*c*).

(*a*) 9 Mod. 427.

(*b*) 14 East 243. n.

(*c*) 2 Maule and S. 18.

*Hart*, *Wetherell* and *Sidebottom*, and *Hazlewood*, for different parties against the exception.

The four surviving partners, having possessed themselves of all the funds of the five, were bound first to discharge the obligations of the five; and, in taking the accounts between the parties, the Court must consider every subsequent payment as to be carried to the account of that debt which, in a fair and equitable understanding between the parties, was first to be discharged, in exoneration of *Devaynes*'s estate.

The rule of law to which it has been attempted to adapt this case, stands on a principle quite foreign to that with which the Court has now to deal. It is that where there are debtor and creditor, and the debtor owes more than one debt, and pays a sum of money, he has a right to direct to which of the debts that payment shall be applied; and, if he omits to do so, then the law implies that it is immaterial to him to which the payment is applied, and, by his omission, he has left the application to the option of the creditor; and again, that, if the creditor neglects to exercise that option, still the application may be regulated by circumstances.

But how is it in the absence of all circumstances except that of the order of time? Suppose *A.* owes *B.* a debt of £100 contracted five years ago, and another debt of £100 contracted half a year ago, and pays money equal to the discharge of either of the two debts, without directing to which it is to be applied, and without the creditor's doing any act to appropriate it to either. What then? shall it not, in common sense, be taken as applied to the payment of that

1816.
DEVAYNES v. NOBLE, &c.
CLAYTON'S CASE.

debt for which there has been the longest forbearance, and against which, if remaining unsatisfied, the statute of Limitations will soonest operate? *Wentworth* v. *Manning* (a).

This, however, is not a case between the same debtor and creditor. The relations of the parties are altered. What are the terms to be implied in the very first draft drawn by *Clayton* after *Devaynes*'s death? He must be considered as saying to the surviving partners, You are my debtors, in respect of a debt contracted by you and your deceased partner; and I now call upon you to pay me a certain sum in discharge of *that debt*. He draws a second and a third draft on the same terms. He then pays in an additional sum, not expressing that he pays it in to any new account, and afterwards draws a fourth draft. What is there to shew that this fourth draft was drawn upon any other terms than the three preceding? He knows that it is the duty of the four to pay the debts due from the five. He knows equally well that it is not competent to him, by giving credit to the four, to charge the estate of the deceased partner with any sums to which it was not previously liable.

If Mr. *Clayton* had been asked, when he began to draw upon and pay money to the surviving partners, knowing that *Devaynes*'s representatives had nothing to do with the firm, whether he did so, considering *Devaynes*'s estate as responsible to him, or whether he did not deal upon the sole responsibility of the surviving partners, would he not, as a man of honour and integrity, have answered, Certainly, I never had any conception that any other but the surviving partners

(a) 2 Eq. Ab. 261.

were responsible? If he had been asked, whether he did not consider that as in the ordinary course of his former dealings with the partnership, the first draft he drew on the new partnership was in like manner applicable to the old balance, would he have hesitated for a moment to say, I drew this draft considering that, whenever there is an item on one side of an account, it is supposed to be in satisfaction of the old standing items on the other side, and that, whenever a balance is struck, there is an extinction *pro tanto* of the existing debt? If, on the other hand, Mr. *Clayton* had done these acts in contemplation of reserving to himself the double responsibility of the surviving partners, and of the estate of the deceased partner; would not a Court of Equity have said, this is a fraud in him to endeavour so to deal with the surviving partners as to be guaranteed by the estate of the deceased partner, without communicating to the representatives of the deceased partner that he is dealing with that intention?

When Lord *Eldon* said, in Ex parte *Kendal* (a), that there may be dealings between the surviving partners and the creditors of the old partnership which would discharge the estate of the deceased partner, could he by possibility have contemplated a stronger case, in respect of such dealings, than the present? If it were competent to the creditor thus to deal with the surviving partners, keeping to himself in reserve the responsibility of the deceased partner's estate, for nine months after his death, why not for nine years? Why not for thirty years, during which he might have paid in hundreds of thousands; and, if at the end of the thirty years, one of the survivors were to become in-

(a) 17 Ves. 514.

1816.
DEVAYNES
v.
NOBLE, &c.
CLAYTON'S
CASE.

solvent, he might even then, upon this principle, resort to the account *ab initio*, and, fixing upon the sum to which the balance was at one time reduced, call upon the Court to give him out of the estate of the deceased partner the amount of that balance (*a*).

*July* 28, 29, 1815.

(*a*) In this part of the argument, the case of Ex parte *Toulmin*, before the *Lord Chancellor*, was cited; of which the facts appear to have been as follows:—

*Abraham* and *Richard Toulmin* carried on business in partnership, as army agents, until the 31st of *August*, 1806, when the partnership was dissolved, *Richard* having become a lunatic; from which time *Abraham* continued to carry on the business, and shortly afterwards assumed *Copland* as his partner therein.

The books of the former partnership were regularly kept, and a balance struck up to the time of the dissolution. From the 1st of *September*, 1806, a new set of books was opened, in which the debts due to *A.* and *R. T.* at the time of the dissolution were stated as due to the old partnership; and, when any money was subsequently received on account of the debtors, a balance was struck, and the sums remaining due carried on as a debt due to the new partnership; after which the accounts were carried on by receipts and payments in the usual way.

It being referred to the Master to take an account of the partnership dealings between the lunatic and *A. Toulmin*, and of the partnership property, debts and effects, and the receipts and payments by and on the part of *A. Toulmin* on account thereof; the Master stated his opinion to be, that whatever sums had been actually received by the new partnership, under the circumstances above detailed, should be

Now, if Mr. *Clayton* could shew that, at any period, he attributed his payments into the banking-house to any particular account distinct from the other account, and that he attributed his drafts correspondingly to those payments, that might have considerable weight; for he might say, having no doubt his old balance

---

carried to the account of the debts due to the partnership of *A.* and *R. T.*, without giving to the new house credit for their new advances to the several debtors, (which advances were made in the usual course of business as army agents,) until the old debts should be satisfied.

*Abraham Toulmin* objected to this Report of the Master and stated, as a ground of objection, that in the business of navy agents it is the invariable custom to advance monies to the officers employing them, for the purpose of securing their agency, and thereby enabling such agents to repay themselves the monies due from such officers, and that it would be impracticable to carry on business without making such advances. That, in many instances, the advances made by the new partnership of *T.* and *C.* were made in payment of bills accepted by them at the special application of their customers, and under engagements that the same should be applied out of the monies then about to be received by the partnership; and that such acceptances were given on the faith of their being permitted so to apply such monies accordingly.

The objections being disallowed by the Master, the question now came before the Court upon a petition to confirm the Master's report; a counter-petition being presented by *Abraham Toulmin* on the ground taken by the objections.

For the last mentioned petitioner (*a*), the case was compared

(*a*) The argument and judgment, *Ex relatione.*

1816.

DEVAYNES
v.
NOBLE, &c.

CLAYTON'S
CASE.

would ultimately be paid; but, doubting whether the new house would be able to pay back the sums he paid in, he had taken care to draw upon the recent payments, reserving to himself the liability of *Devaynes*'s estate. Even then, it would be said, what-

---

to that of a *West India* plantation; where if a partner withdraws from the concern, leaving the others to carry on the trade under an engagement to collect the debts and to account for them, the remaining partners are not obliged to bring actions for all the debts, which would often be the certain way of losing all; but the first thing looked to for payment of the debts is, the consignments; which consignments necessarily require supplies in the first instance; for, if no supplies are sent, no consignments will be made, and the consignments are made on the faith of the supplies being furnished. The retiring partner, therefore, cannot expect that the remaining partners will charge themselves with the whole consignments, as received in payment of the debts owing to the old partnership, but only with the difference, after deducting the supplies.

The *Lord Chancellor*, after observing that what was alleged as to the necessity of advances, without which the trade could not be carried on, had great weight, said that, in this case, the accounts had not been so kept as to shew what sums ought to have been carried to the credit of the old house; but that they ought to have been so kept, in order that the old house might at all times see the last state of the account, and satisfy themselves as to what had been done. Not a single sum had been set aside in payment of the old debts; and, if it were to be sent back to the Master, there must be an inquiry what sums ought to have been carried to the credit of the old debts in every instance, so as to take issue upon every distinct item, which would be impracticable. The Report was confirmed.

ever was your intention, it was one upon which, if you acted, you were bound to disclose it to *Devaynes*'s representatives. Otherwise, you have acted fraudulently towards them, and a Court of Equity will give you no assistance. But that is not the present case. There was no such intention on the part of Mr. *Clayton;* and it comes simply to this, whether his dealings with the surviving partners are not such as come within the meaning of Lord *Eldon*, when he says there may be dealings which would discharge the estate.

(In addition to the cases already cited, the following were mentioned. *Simpson* v. *Vaughan* (*a*), *Strange* v. *Lee* (*b*).)

*Bell*, in reply.

If a man is bound in any one bond jointly with another, as principal and surety, and in another bond by himself alone, and pays money on account, nobody can doubt he means to pay off the bond in which he is solely bound, in preference to that in which another is bound with him. If it is asked on one side, how did Mr. *Clayton* mean to apply this payment?—I would ask on the other, how did Mr. *Devaynes*'s partners mean that it should be applied?—Certainly, in payment of their own debts, not of the debts of the five.

Where is the authority for the alleged rule as to the priority of the debts? In *Newmarch* v. *Clay*, the Lord Chief Baron was of opinion, the payment was not applicable to the first debt, notwithstanding there

(*a*) 2 Atk. 31. (*b*) 3 East 484.

1816.
DEVAYNES v. NOBLE, &c.
CLAYTON'S CASE.

was a partner concerned in the first who was not concerned in the second; and the Court of K. B. afterwards varied the decision, not on that ground, but on a ground which was perfectly distinct. If that ground existed, why did Lord *C. J. Gibbs* say, that *Dawe* v. *Holdsworth* was distinguishable on account of its being a case of bankruptcy? Every argument applicable to this case might have been applied to *Kirby* v. the Duke of *Marlborough*; for *Devaynes*'s estate cannot be placed in a higher degree of responsibility than that of a surety.

In Ex parte *Kendal*, Lord *Eldon* expressly declared he would not decide the question. Then why refer to that case as containing his lordship's decision of this?

Whether the continuation of payments and receipts alone amounts to a discharge is a mere legal question in the case of a withdrawing partner, and must be decided on the same principles in the case of a partner who dies. Does a single payment, or a single receipt, alter the case? They say, yes; but where is the authority? *Newmarch* v. *Clay* is an authority against them. So are all the cases. They are all cases which decide that it may be inferred from circumstances. But the question remains, What is a sufficient foundation for the inference? The continuance of the transactions, it has been held over and over again, is not enough. It must be a continuance attended with other circumstances.

Then they say, the new firm ought first to pay off the old debts. That depends upon whether they have assets of *Devaynes* in their hands. If he was a debtor

to them, where was the obligation between them? The obligation, if there was any, must depend on their having assets of his in their hands. But, if there had been such an obligation, how would that affect Mr. *Clayton* as a creditor? *Crawshaw* v. *Holmes Featherstonhaugh* v. *Fenwick*.

The house was not trading on *Devaynes*'s assets. In fact, the assets of the house, at the period when Mr. *Devaynes* quitted it, were not got in; and that creates the insolvency of the house. The house had been paying off the debts contracted in *Devaynes*'s lifetime by their new credit; and, in this very case of Mr. *Clayton*'s, where we claim only £453, the difference between that sum and the £1171 has been paid by money lodged with these gentlemen, and obtained on their own credit; for the assets of the house are still outstanding.

Then, what is the equity of this case? What circumstances are there which apply to the case of a dying partner, and do not apply to the case of a retiring partner? It is said, the debt is extinguished at law; and that equity will not revive it, where there is a superior equity. But this is a fallacy. The debt was not extinguished; for, though the remedy was gone at law, it continued in equity; as in *Lane* v. *Williams*, *Bishop* v. *Church*, &c. as soon as the securities were found to be given for a partnership debt, they were considered as joint and several. The single questions, therefore, are whether the continuing to deal, by drawing out and paying in, has operated to extinguish the debt, or whether it has been so extinguished by the circumstance of the account delivered? And these questions must be taken as the facts stand upon

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

the report; that is, without any inquiry how the affairs of the house stood as between *Devaynes* and his partners.

The case of *Wentworth* v. *Manning* was one of a specific payment, and therefore does not apply. But, if it were applicable, it would be contradictory to the cases of *Goddard* v. *Cox*, and the others which have been cited, and therefore of no authority, considering the book in which it is printed (*a*).

*The* MASTER *of the* ROLLS.

*July* 23.

Though the Report, following (I presume) the words of the inquiry directed by the Decree, states the Master's opinion to be, that Mr. *Clayton* has, by his dealings and transactions with the surviving partners, subsequent to the death of Mr. *Devaynes*, released his estate from the payment of the cash balance of £1713, yet the ground of that opinion is, not that the acts done amount constructively to an exoneration of Mr. *Devaynes*'s estate, but that the balance due at his death has been actually paid off,—and, consequently, that the claim now made is an attempt to revive a debt that has once been completely extinguished.

To a certain extent, it has been admitted at the bar, that such would be the effect of the claim made before the Master, and insisted upon by the exception. To that extent it is, therefore, very properly abandoned;

(*a*) 2 Eq. Ab. 261.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

and all that is claimed is the sum to which the debt had at one time been reduced.

It would, indeed, be impossible to contend that, after the balance, for which alone Mr. *Devaynes* was liable, had once been diminished to any given amount, it could, as against his estate, be again augmented, by subsequent payments made, or subsequent credit given, to the surviving partners. On the part of Mr. *Devaynes*'s representatives, however, it is denied that any portion of the debt due at his death now remains unsatisfied. That depends on the manner in which the payments made by the house are to be considered as having been applied. In all, they have paid much more than would be sufficient to discharge the balance due at *Devaynes*'s death;—and it is only by applying the payments to subsequent debts, that any part of that balance will remain unpaid.

Application of indefinite payments, by the rules of the civil law, giving the first option to the debtor, the second to the creditor, to be expressed at the time of payment; but, if no express declaration by either, presuming an intention in favour of the

This state of the case has given rise to much discussion, as to the rules by which the application of indefinite payments is to be governed. Those rules we, probably, borrowed in the first instance, from the civil law. The leading rule, with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as in that of the debtor, "in re præsenti; hoc est statim atque solutum est:—cæterum, posteà non permittitur" (*a*). If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual inten-

(*a*) Dig. Lib. 46. tit. 3. Qu. 1. 3.

1816.
DEVAYNES v. NOBLE, &c.
CLAYTON'S CASE.

debtor; or, if the debts are equal in their nature, then applying the payment according to priority.

tion of the debtor that would, in the first instance, have governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burthensome debt,—to one that carried interest, rather than to that which carried none,—to one secured by a penalty, rather than to that which rested on a simple stipulation;—and, if the debts were equal, then to that which had been first contracted. "In his quæ præsenti die debentur, constat, quotiens indistinctè quid solvitur, in graviorem causam videri solutum. Si autem nulla prægravet,—id est, si omnia nomina similia fuerint,—in antiquiorem" (*a*).

Cases in which our Courts appear to have extended the rule of civil law, so as to give to the creditor, in the absence of express appropriation by the debtor, an indefinite right of electing.

But it has been contended that, in this respect, our Courts have entirely reversed the principle of decision, and that, in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern; or, at least, that the creditor may, at any time, elect how the payments made to him shall retrospectively receive their application. There is, certainly, a great deal of authority for this doctrine. With some shades of distinction, it is sanctioned by the case of *Goddard* v. *Cox* (*b*); by *Wilkinson* v. *Sterne* (*c*); by the ruling of the Lord Chief Baron in *Newmarch* v. *Clay* (*d*); and by *Peters* v. *Anderson* (*e*), in the Common Pleas. From these cases, I should collect, that a proposition which, in one sense of it, is indisputably true,—namely, that, if the debtor does

(*a*) Dig. L. 46. t. 3. Qu. 5.
(*b*) 2 Stra. 1194.
(*c*) 9 Mod. 427.
(*d*) 14 East 239.
(*e*) 5 Taunt. 596.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

not apply the payment, the creditor may make the application to what debt he pleases,—has been extended much beyond its original meaning, so as, in general, to authorise the creditor to make his election when he thinks fit, instead of confining it to the period of payment, and allowing the rules of law to operate where no express declaration is then made.

Other cases which seem to recognize the strict rule of the civil law, limiting the creditor's option to the time of payment.

There are, however, other cases which are irreconcileable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such are, in particular, the cases of *Meggott* v. *Mills* (a), and *Dowe* v. *Holdsworth* (b). The creditor, in each of these cases, elected, *ex post facto*, to apply the payment to the last debt. It was, in each case, held incompetent for him so to do. There are but two grounds on which these decisions could proceed;—either that the application was to be made to the oldest debt, or that it was to be made to the debt which it was most for the interest of the debtor to discharge. Either way, the decision would agree with the rule of the civil law, which is, that if the debts are equal, the payment is to be applied to the first in point of time—if one be more burthensome, or more penal, than another, it is to it that the payment shall be first imputed. A debt on which a man could be made a bankrupt, would undoubtedly fall within this rule.

The Lord Chief Justice of the Common Pleas explains the ground and reason of the case of *Dowe* v. *Holdsworth* in precise conformity to the principle of the civil law.

(a) Ld. Raym. 287. (b) Peake N. P. 64.

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

In cases, as of a banking account, where there has been a continuation of dealings, the appropriation (in the absence of express declaration) can only be made on the ground of presumption arising from the priority of receipts and payments. If any other appropriation is to be made, it is incumbent on the creditor to declare his intention at the time of payment.

The cases then set up two conflicting rules;—the presumed intention of the debtor, which, in some instances at least, is to govern,—and the *ex post facto* election of the creditor, which, in other instances, is to prevail. I should, therefore, feel myself a good deal embarrassed, if the general question, of the creditor's right to make the application of indefinite payments, were now necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favour. They were all cases of distinct insulated debts, between which a plain line of separation could be drawn. But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on *Monday*, and this other to the account of the £500 paid in on *Tuesday*. There is a fund of £1000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made?

You are not to take the account backwards, and strike the balance at the head, instead of the foot, of it. A man's banker breaks, owing him, on the whole account, a balance of £1000. It would surprise one to hear the customer say, "I have been fortunate enough to draw out all that I paid in during the last four years; but there is £1000, which I paid in five years ago, that I hold myself never to have drawn out; and, therefore, if I can find any body who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week." This is exactly the nature of the present claim. Mr. *Clayton* travels back into the account, till he finds a balance, for which Mr. *Devaynes* was responsible; and then he says,—"That is a sum which I have never drawn for. Though standing in the centre of the account, it is to be considered as set apart, and left untouched. Sums above it, and below it, have been drawn out; but none of my drafts ever reached or affected this remnant of the balance due to me at Mr. *Devaynes*'s death." What boundary would there be to this method of re-moulding an account? If the interest of the creditor required it, he might just as well go still further back, and arbitrarily single out any balance, as it stood at any time, and say, it is the identical balance of that day which still remains due to him. Suppose there had been a former partner, who had died three years before Mr. *Devaynes*—What would hinder Mr. *Clayton* from saying, "Let us see what the balance was at his death?—I have a right to say, it still remains due to me, and his representatives are answerable for it; for, if you examine the accounts, you will find I have always had cash enough lying in the house to answer my subsequent drafts; and, therefore, all the payments

1816.

DEVAYNES v. NOBLE, &c.

CLAYTON'S CASE.

made to me in *Devaynes*'s lifetime, and since his death, I will now impute to the sums I paid in during that period,—the effect of which will be, to leave the balance due at the death of the former partners still undischarged."—I cannot think, that any of the cases sanction such an extravagant claim on the part of a creditor.

If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished.

If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers,—"Leave this balance altogether out of the running account between us,"—or,—"Always enter your payments as made on the credit of your latest receipts, so as that the oldest balance may be the last paid." Instead of this, he receives the account drawn out, as one unbroken running account. He makes no objection to it,—and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must, therefore, be considered as having concurred in the appropriation.

In this particular case, the creditor's having drawn when there was no fund to answer his drafts, ex-

But there is this peculiarity in the case,—that it is, not only by inference from the nature of the dealings and the mode of keeping the account, that we are entitled to ascribe the drafts or payments to this balance, but there is distinct and positive evidence that Mr. *Clayton* considered, and treated, the balance as a

fund, out of which, notwithstanding *Devaynes*'s death, his drafts were to continue to be paid. For he drew, and that to a considerable extent, when there was no fund, except this balance, out of which his drafts could be answered. What was there, in the next draft he drew, which could indicate that it was not to be paid out of the residue of the same fund, but was to be considered as drawn exclusively on the credit of money more recently paid in? No such distinction was made; nor was there any thing from which it could be inferred. I should, therefore say, that, on Mr. *Clayton*'s express authority, the fund was applied in payment of his drafts in the order in which they were presented.

cept the balance in hand at *D.*'s death, must be considered as an express declaration of his intention that the fund should be applied in payment, not only of the drafts so drawn, but of the succeeding drafts, in the order in which they were presented.

But, even independently of this circumstance, I am of opinion, on the grounds I have before stated, that the Master has rightly found that the payments were to be imputed to the balance due at Mr. *Devaynes*'s death, and that such balance has, by those payments, been fully discharged.

The Exception must, therefore, be over-ruled.

*July* 24.

Creditors, in respect of stock standing in the names of the partners, which was sold in breach of trust, and the proceeds applied to the use of the

Sir *Thomas Baring* (as Executor of *Wigglesworth*,) represented the claims of those creditors who had stock standing in the names of the partners, or of one of them, which was sold in the lifetime of *Devaynes*, without the knowledge of the creditors, and the proceeds applied to the use of the partnership.

The Master reported his opinion to be, that the estate of *Devaynes* was liable to pay to the creditors the value of the stock at the date of his Report.

1816.

DEVAYNES
v.
NOBLE, &c.

BARING'S CASE.

partnership, entitled as against the estate of the deceased partner, either to consider it as a debt, or to have the stock specifically replaced, at their option. It makes no difference that the stock stood in the name of, and was sold by, one of the partners only, the proceeds having been applied to the partnership use.

The particular circumstances under which this claim was made, were the following:—

*Wigglesworth*, at the time of his death, was possessed of a large sum in the 3 *per cent.* consols, standing in the name of *Noble*; the partnership also were indebted to him on the banking account. After his death, his Executors, continuing to employ the house as bankers in respect of his estate, directed the dividends when received by them to be laid out in accumulation of the stock so standing in the name of *Noble*, which was done from time to time accordingly. The Master reported that the reason why the original and after-purchased stock stood in the name of *Noble* alone, was because, as one of the partners, by the request, or with the concurrence of the rest, he took into his own hands the general management both of the stock belonging to the house, and of that entrusted to the house by their customers, for the convenience of receiving dividends, and selling such stock, when requested so to do, without the expence of powers of attorney for those purposes; but that the so placing the stock in the name of *Noble* alone, was the act of the house, for its own convenience, and not by the direction or appointment of the customers, who gave their directions and authority to the partners jointly; although, in this case, they knew that the stock had been placed in the name of *Noble* alone, and believed that it so continued until after *Devaynes*'s death. The Master further reported that the stock belonging to the house in its own right was no way distinguished in the bank books from the same species of stock belonging to the customers, and by them entrusted to the partnership; so that it was impossible to ascertain whether any part of the stock sold out was the specific property of *Wigglesworth*,

or his Executors, except by a deficiency in the amount of stock remaining in the name of *Noble*.

The Report proceeded to state, that the amount of stock belonging to *Wigglesworth*'s estate, including the accumulations at *Devaynes*'s death, was £26,200, according to the entries in the passage-book from time to time delivered to the Executors, and as was accordingly supposed by the Executors to be the fact; that it appeared by the accounts rendered since the bankruptcy, that £24,600, (part thereof,) had been sold in *Devaynes*'s lifetime, and that, at the time of his death, the whole amount of stock remaining in the name of *Noble* in the books of the bank was £1050, which, together with stock subsequently purchased by the partnership to the amount in the whole of £5000, was shortly afterwards transferred by *Noble* to a gentleman of the name of *Keen*, in satisfaction of a like amount of stock, the property of the said *Keen*, which had, prior to *Devaynes*'s death, been standing in the name of *Noble*, in the manner above represented.

From these and other circumstances mentioned in the Report, the Master found that the whole £26,200 had been sold out in *Devaynes*'s life, and the proceeds applied to the use of the partnership, as aforesaid; the partners in the mean while regularly accounting for the dividends as received by them; and the Executors supposing, during the whole of *Devaynes*'s lifetime, and until after the bankruptcy, that the stock was still remaining.

In support of the exceptions taken by *Devaynes*'s representatives, it was contended that, the stock standing in the name of *Noble* alone, with the knowledge and consent of the customers, he alone, and not the

1816.
DEVAYNES v. NOBLE, &c.
BARING'S CASE.

partnership, was responsible for the loss of it; and also that, supposing the other partners to be liable, yet, to the extent of the £1050 stock remaining in the house at *Devaynes*'s death, his estate was not answerable.

*The* MASTER *of the* ROLLS.

This is too clear upon the Master's Report to require any argument in support of his finding. The partners appointed *Noble* to buy the stock; it was invested in his name; and the utmost that can be alleged with regard to *Wigglesworth* is, that he knew that fact. Now, the only question that could arise, as to that, would have been how the case would have stood if *Noble* exclusively had sold the stock, and had embezzled the money; whether the fact of *Wigglesworth*'s knowledge that he had been so appointed would have made him answerable for the loss. But, inasmuch as the money was employed for the benefit of the partnership, being carried immediately into their books, it is impossible that question can arise; for the partners had the benefit of the breach of trust, and they, subsequently, in the accounts which they rendered to *Wigglesworth*'s Executors, falsely represent the stock as still continuing in the name of *Noble*, and give credit for the dividends as if the stock were still in *specie*.

There can be no doubt that the breach of trust is imputable to the partners, and that the debt is a partner ship debt.

Then, as to the last objection, that the Master was not warranted in finding that the whole stock was sold out at Mr. *Devaynes*'s death, the Master has not, indeed, conclusive evidence, but he has fair presumptive

evidence, from which the inference might be drawn; for it is clear they had not left stock enough to answer the demands both of Sir *Thomas Baring* and Mr. *Keen*; and, inasmuch as they found it necessary to make an investment immediately for the purpose of answering Mr. *Keen*'s stock, it was reasonable to conclude that this stock which was left remaining was no stock that could be said to belong to Sir *Thomas Baring*. They maintain by the exception, that the Master ought to have found that the whole of Sir *Thomas Baring*'s stock was not sold out in the lifetime of Mr. *Devaynes*, but that the sum of £1050 was sold out by Mr. *Noble* after his decease. But what evidence have they to produce in support of that proposition, or that would justify such a finding? The presumption is the other way.

Therefore, this Exception must be over-ruled.

Another Exception was taken by Sir *Thomas Baring* on the ground that he was entitled to have the stock specifically replaced, or, in other words, to be placed by *Devaynes*'s estate in the situation he would have been in if no breach of trust had been committed; and that he was not bound to accept the present value, according to the Master's Report, although it might be either more or less beneficial under the circumstances.

Sir *S. Romilly* and *Shadwell*, in support of this Exception.

*The* MASTER *of the* ROLLS.

In all these cases, an election is given to consider it as a debt, or to have it replaced.

[Exception allowed.]

1816.

DEVAYNES
*v.*
NOBLE, &c.

HOULTON'S CASE.

Deposit of bills with the house in *D.*'s lifetime, which were sold by the house, part in his lifetime, and part after his death. The estate of *D.* is not answerable in respect of the latter, though in this particular case it appeared that the party who deposited them had no notice of the death of *D.*

Mr. *Houlton*'s case, singly, differed from all the rest, in the circumstance that he did not know of *Devaynes*'s death, but dealt under the impression that he was alive, and continued in the firm. The nature of his transactions with the partnership was that he deposited bills with the house in *Devaynes*'s lifetime, part of which were sold by the house before, and part after *Devaynes*'s death. As to his case, the Master reported in favour of his claim for the bills sold in *Devaynes*'s lifetime, but disallowed it in respect of such as were sold by the surviving partners after *Devaynes*'s death, considering the fact of his being ignorant of that event as immaterial, and not making any difference in the case.

The Exception taken was, "for that the Master had reported his opinion to be that, as to £734, part of the balance of £4356 mentioned in the report, (being the amount of the principal sum of £700 secured by two exchequer bills for £200 and £500 respectively, and of such interest thereon as was included in the said balance,) the Testator *William Devaynes*'s estate is not liable for or chargeable with the same, the said two bills having been sold by the surviving partners after the death of the said Testator; whereas the Master ought to have reported that the estate of the said Testator is liable for and ought to be charged with the said sum of £734."

*Heald*, in support of the Exception.

This case is to be considered as distinct from any question relating to a breach of trust. It is not like a case where property is deposited in the hands of

1816.

DEVAYNES v. NOBLE, &c.

HOULTON'S CASE.

Trustees who are independent one of another, who do not enter into any engagement with respect to the conduct of each other, and who receive it as a mere deposit. These bills were not placed in the hands of persons in that situation, but with partners engaging for the honesty, and trust-worthiness, and solvency of each other, as in a trading transaction. I admit it to be otherwise in the case of Trustees, where the estate of the deceased is clearly not liable for a breach of trust committed by the survivors, as, for instance, for their neglecting to renew a lease, or to provide a fund for that purpose. But here, at the time when Mr. *Houlton* deposited these exchequer bills, the agreement was to return them, or other bills in lieu of them when paid off by government. If they had entered into a written agreement for this purpose, there can be little doubt, according to the cases cited, (*Lane* v. *Williams*, &c.) that *Devaynes*'s estate would be considered liable, whether the misapplication was his own act in his lifetime, or the act of his partners after his death. Then, where is the distinction, in this case, between a written and a verbal agreement? But there are the entries in the passage-book, which amount to something like a written agreement; and the Master's report expressly states that there was an agreement. What has there been to put an end to this agreement? As I construe the *Lord Chancellor*'s words in Ex parte *Kendal*, they mean to say that, in the case of a cash balance, where three partners come to an agreement, and one dies, his estate must in equity make good a breach of that agreement; and, if so in the case of a cash balance, what is there to distinguish that from the deposit of a security?

Now, suppose these bills had in *Devaynes*'s lifetime

1816.

DEVAYNES *v.* NOBLE, &c.

HOULTON'S CASE.

been deposited by the partnership with their broker for the purpose of being sold, and that they were not actually sold, or the produce not actually received by the house, till after *Devaynes*'s death; in that case, his estate would not have been benefited by the produce. The misapplication of the bills was not the giving them to the broker, because, till they were sold, Mr. *Houlton* might have got them back. Then, if the receipt of the money is the act to be looked to, it will be difficult to say upon what principle *Devaynes*'s estate can be made liable. Suppose the case of any specific property placed in the hands of the partnership, and that *Devaynes* had raised money, in his life-time, by depositing it in the hands of a third person,—say to the amount of £1000,—and that, after his death, that third person advanced to the surviving partners another £1000 on the same security. It could not be said that *Devaynes*'s estate was not liable for the first £1000. That has been already decided. Then, could it be said that the creditor must look to his estate for the one £1000, and resort to the commission for the other? No such distinctions could be made if the agreement were considered as binding on *Devaynes*'s estate in the first instance; but otherwise there is no limit to the questions that would arise in every imaginable case.

If the surviving partners are to be considered as solely responsible, the law must be the same, in whatever way the bills may have been disposed of. Thus Mr. *Houlton* could not have followed *Devaynes*'s estate, even if the balance due to *Devaynes* from the surviving partners had been paid by them out of the produce of these very exchequer bills. Thus his estate would actually be benefited by the breach of trust com-

mitted, and yet the party injured have no remedy against that estate.

That an agreement entered into with all the partners should be enforced against all, appears the plainer from the impossibility of the customers, especially those resident at a distance, all knowing of the decease of a partner at the moment when it happens. In this case, the creditor says to *Devaynes*'s Executors, I gave these exchequer bills to your Testator to keep. Where are they? I am informed that the surviving partners have misapplied them; but I have had no account; I know nothing of any breach of trust; I only expect that they should be forthcoming.

[*The* MASTER *of the* ROLLS

Deferred giving his judgment on this Exception until after the following cases of Mrs. *Johnes* and Mrs. *Brice* should have been heard.]

*July* 25.

JOHNES'S CASE.

Mrs. *Johnes*'s case was that of a creditor at *Devaynes*'s death, in respect of a cash balance, who continued to deal with the surviving partners by paying to, and receiving from them, whereby the cash balance was sometimes reduced, and sometimes increased, but upon the whole *reduced*. This class of creditors also deposited exchequer bills after *Devaynes*'s death with the surviving partners, who sold them and converted the money to their own use.

The Master disallowed her claim, in respect both of the cash balance and the exchequer bills.

1816.

DEVAYNES v. NOBLE, &c.

JOHNES'S CASE.

The counsel for Mrs. *Johnes* declined to argue the first of these exceptions as not sustainable; the second was under the same circumstances with the following:—

---

BRICE'S CASE.

This was the case of a creditor who, during *Devaynes*'s lifetime, deposited with the house *India* bonds, which were sold by the surviving partners. The case differed from Mr. *Houlton*'s in the circumstance that the creditor had notice, in the ordinary way, of *Devaynes*'s death.

The Master reported that *Devaynes*'s estate was not liable to the payment of these *India* bonds, because the breach of trust was committed by the surviving partners.

*Bell* and *Palmer*, in support of the Exception.

*Fonblanque*, for the Assignees of the surviving Partners.

Bankers who have the management of property in the funds derive an advantage from the commission on the different transfers. They are not, therefore, in the situation of mere naked trustees, but are persons holding under a specific contract made with them in their partnership capacity; as much a joint and several contract as in the case of money lent.

The doctrine of the civil law, as applicable to such cases, is laid down in the following words: "If two or more persons are become depositaries of one and the

same thing, each is answerable for the whole. For the thing deposited is not restored unless it be restored entire; and they shall be answerable for one another in case of any fraud committed by any one of them. Neither will the action that is brought against one of the depositaries take away the right of afterwards suing all the rest, until the whole thing is restored" (a).

Now, if these partners were joint depositaries, supposing Mr. *Devaynes* had retired, and a dissolution of partnership had taken place by agreement, would he not be bound, though he meant to give up that trust, and no longer to be responsible for the deposit, to have given notice to the persons who made the deposit? *Newsome* v. *Coles* (b). And in *Graham* v. *Pope* (c), it is laid down, that it is incumbent on persons dissolving a partnership to send express notice of such dissolution to all the persons with whom they then had dealings; and that a general notice in the Gazette is not sufficient.

Then, are not the Executors bound to send the same notice, in the case of a partner dying, that the partner himself would be bound to send in case of retiring.

[*The* MASTER *of the* ROLLS.

If the doctrine cited from the civil law be the law of this country, you have your legal remedy against Mr. *Devaynes*'s representatives.]

(a) Domat. Lib. 1. tit. 7. sect. 1. art. 11.

(b) 2 Campb. 617.

(c) Peake N. P. 154.

1816.

DEVAYNES v. NOBLE, &c.

BRICE'S CASE.

*For the Assignees.*

It is rather an equity in the administration of the civil law; and, if so, there is no medium through which it can be rendered available to us but that of a Court of Equity. It is stated as being the rule of the civil law, and we draw largely from the civil law upon this subject.

*For the Master's Report.*

The civil law does not lay down that the contract survives.

*In support of the Exceptions.*

That is another point. We have shewn that the legal rights survive, although the interest does not. The question is, How that interest is to be dealt with. A court of law can deal with it on an action of account between the parties; but, between creditors and the representatives of a deceased partner, the only resort is to a Court of Equity.

*The* MASTER *of the* ROLLS, [stopping the counsel for *Devaynes*'s representatives.]

If there be no remedy at law against the Executors of Mr. *Devaynes*, I am at a loss to understand the equity on which this Court is to interpose to make good the loss against Mr. *Devaynes*'s estate. It has not been incurred by any thing that he did or neglected to do. The bills were safely kept as long as he had any thing to do with them. From the act of placing them

1816.

DEVAYNES v. NOBLE, &c.

BRICE'S CASE.

in the custody of a partnership, it followed that, upon the death of one of the partners, they would fall into the possession of the surviving partners. Mr. *Houlton* himself, therefore, has virtually placed them there. Mr. *Devaynes*'s Executors could not take them away. Mr. *Devaynes* could not direct his Executors to take them away; and, though Mr. *Devaynes* has neither been personally instrumental in the loss, nor personally benefited by it, nor could have prevented it, yet it is contended that it is upon his estate the loss ought to be thrown, and that by a Court of Equity. I apprehend, however, that it would be the reverse of equity to throw the loss on his estate in such a case as the present. It might be as well contended that, if they had thrown the bills into the fire, or lost them by negligence, Mr. *Devaynes* would be responsible for such act of negligence. He had no more to do with the sale of the bills than he would have had to do with a loss occasioned by such means as these.

I am clearly of opinion that these Exceptions must be over-ruled.

PALMER'S CASE. *July* 30.

Creditors at the death of *D.*, who continued to deal with the surviving partners, both by drawing out and paying in money, whereby

Sir *John Palmer*'s case was that of a creditor of the house at *Devaynes*'s death, who afterwards continued to deal with the surviving partners by both drawing out and paying in money, whereby the debt due to the creditor was increased, but never at any time reduced.

As to this class, the Master was of opinion that every payment made by the surviving partners must be applied in reduction of the balance due by the

1816.

DEVAYNES v. NOBLE, &c.

house of *Devaynes*, *Dawes*, *Noble* and Co., notwithstanding the intermediate receipts of the surviving partners had much exceeded their payments.

PALMER'S CASE. their debts were increased, but never at any time reduced. Held, no discharge of the deceased partner's estate.

The only distinction attempted to be taken between this case and that of Miss *Sleech* was, that, with respect to these payments, they were *mutual* dealings, whereby the estate of *Devaynes* ought to be considered as discharged.

But the *Master of the Rolls* said, the principle on which he decided Miss *Sleech*'s case was, that the payments made must be applied to the first debt in the account; that a man, by merely paying money into the house, cannot be said to have taken the bankers for his debtors. True, he makes them debtors for a new sum:—but how is that an acquittal of an old debtor?

[Exception over-ruled.]

Transfer of stock to the partnership, as a security for advances, under an agreement not to sell without notice. *D.*'s estate liable to the full extent of stock sold contrary to such agreement, and not only to the ex-

The case of Mr. *Warde* was that of one who had transferred stock to the partnership, by way of collateral security for their advances on his drawing account; under an express agreement that no part of the stock so transferred should be sold out without giving him notice. His account being considerably over-drawn, this stock was afterwards sold out by the partnership in *Devaynes*'s lifetime, contrary to the agreement, without notice; and the produce applied, as in Sir *Thomas Baring*'s case, to the use of the partnership; they continuing to treat it in their dealings with him as unsold, and giving him credit for the dividends.

The Master reported that the value of the stock should be given credit for, as if to be sold at the date of his report; and the only exception taken was the general exception of *Devaynes*'s representatives, that their Testator's estate had been released by the subsequent dealings.

*In support of the Exception,*

It was contended that the partners had a right to sell out this fund to the extent of covering the amount by which Mr. *Warde* had overdrawn his banking account; that they had consequently committed no breach of trust, except by selling beyond the last mentioned amount; and that Mr. *Warde* had a right to have the stock specifically replaced only *pro tanto*.

[Ex]tent of the stock sold beyond the amount of the debt due to the partnership in respect of advances made by them.

But *His Honor* was clearly of opinion that this was, under the circumstances, a breach of trust as to the entire fund so sold out and applied.

[Exception over-ruled.]

1816.

Rolls, *July* 9—12 26—29.

The Reverend ANDREW DAUBENY and GILES DAUBENY, - - - Plaintiffs,

AND

Sir WILLIAM COCKBURN, JOHN ELLIS, and JUDITH his Wife, - Defendants.

Voluntary Settlement of personal property, in trust for such one or more of his children as the Settlor shall appoint. Appointment to one child, exclusively, upon a secret understanding that that child shall re-assign a part of the fund to, or in favour of, a Stranger. This Appointment is a fraud upon the settlement; and void, not only to the extent of the sum assigned back, but *in toto*. Bill, by purchaser for valuable consideration, without notice, under this appointment, dismissed as against the person entitled under the settlement in default of appointment, such person having also the legal estate in the fund which was the subject of the appointment.

JAMES COCKBURN, Esq., having one son, (the Defendant, Sir *William Cockburn*,) and two daughters, and being possessed of £10,000, which he had lent on various securities in the names of *W. Froggatt*, and of his daughter *Margaret*, made a voluntary settlement, dated the 5th of *March*, 1784, by which it was declared that the said *Froggatt* and *Margaret Cockburn* should stand and be possessed of the said fund, and of the securities whereon the same was invested, upon trust, as to £2000, for the said *Margaret*; and, as to the remaining £8000, to pay the interest to the Settlor for life; and, after his decease, as to £2000 (part thereof,) for his daughter *Mary*; and as to £1000 (other part thereof) for his son *William*; and, as to the residue, "Upon trust for all and every or such one or more of the child and children of the said *James Cockburn*, as he the said *James Cockburn* should direct or appoint:" and, in default of appointment, for his said son *William*, his Executors, &c.

*Margaret Cockburn* married *Cole*, and received her £2000 portion under the settlement. The £1000 portion for Sir *William Cockburn* was also raised and

paid to him in the lifetime of his father. *Mary* died before her portion was paid.

By Deed poll, dated the 19th of *May*, 1796, under the hand and seal of the said *James Cockburn*, reciting that *Margaret* had relinquished her trust to Sir *William*, who, together with *Froggatt*, became and then stood possessed of the remaining sum of £7000, and interest, and the securities for the same, upon the trusts of the settlement, and that, upon the death of the said *James Cockburn*, £2000, part of the said £7000, would go to the representatives of his deceased daughter *Mary*, and £5000 (residue thereof) would thereupon become payable to or between such one or more of the children of the said *James Cockburn* as he should appoint, and further reciting that the said *James Cockburn* was desirous of settling, and had agreed to appoint, the said £5000 (expectant as aforesaid) absolutely to his daughter the said *Margaret Cole*, as thereinafter mentioned; it was witnessed that, in pursuance of such desire, and in consideration of the natural love and affection which he bore towards his said daughter, he the said *James Cockburn* (in pursuance and execution of the said recited power or authority, and by force and virtue thereof,) did thereby absolutely and irrevocably direct, limit, and appoint, all that the said sum of £5000, as the clear residue or unappointed remainder of the said trust monies, and the securities, &c. and the interest dividends, &c. in reversion or remainder expectant on his decease, unto his said daughter *Margaret Cole*, her executors, administrators, or assigns, absolutely; but nevertheless so that the said *Margaret Cole* might, notwithstanding her coverture, by any deed under her hand and seal, attested as therein mentioned, appoint the said sum of £5000 to or in trust for any person or

1816.

DAUBENY
v.
COCKBURN.

persons, in such proportions, and for such intents and purposes, &c. as she might think fit. And the said *James Cockburn* declared, that the said Trustees should thenceforth stand possessed of the said £5000, &c. in reversion, as aforesaid, in trust for the said *Margaret Cole*, or such person or persons as she should in manner aforesaid appoint; and, in default of appointment, should pay or assign the same to the said *Margaret Cole*, her executors, or administrators, absolutely.

By Indenture dated the 20th of *May*, 1796, (the day following the day of the date of the deed poll,) between the said *Margaret Cole* of the one part, and the Defendant Mrs. *Ellis*, then *Judith Land* spinster, of the other part; reciting that the said *Margaret Cole* was desirous, and had agreed, to settle and assure £2000, (part of the said £5000,) to the said *Judith*, for her own use and benefit; it was witnessed that, in pursuance of such desire or agreement, "and in consideration of five shillings, and for other good considerations," she, the said *Margaret Cole*, did, in pursuance of the power given to her by the said deed poll, absolutely and irrevocably appoint the said £2000, together with the full benefit of the securities upon which the said £5000 was or might be invested, (so far as related to the security of the said £2000,) and all other the produce, &c. thereof, in reversion, as aforesaid, unto the said *Judith*, her Executors, &c., so as that she might at any time thereafter appoint or bequeath the same in such manner as she should think proper; and, in default of appointment, absolutely.

By Indenture, dated *Feb.* 7, 1797, between *Thomas Cole* and *Margaret* his wife, of the one part, and *Andrew Daubeny*, of the other part, reciting the set-

tlement of 1784, and the deed poll, and that the said *Margaret Cole* had then made no appointment of the trust monies; but having occasion for money, and the said *Andrew Daubeny* having agreed to lend her £2000 on the security of the said trust monies, she the said *Margaret Cole*, and *Thomas Cole* her husband, had agreed to appoint the same to him the said *Andrew Daubeny*, as therein mentioned; it was witnessed, that in consideration of £2000, she the said *Margaret Cole* did, in pursuance of the power given her by the said deed poll, appoint, and the said *Thomas Cole* assigned and transferred, the said £5000, (trust monies,) and the securities, &c. to the said *Andrew Daubeny*, his Executors, &c. subject to redemption on payment of the £2000 and interest.

By another Indenture, dated *March* 12, 1799, between *Andrew Daubeny*, of the first part, *Thomas Cole* and *Margaret* his wife, of the second part, and *Joseph Pitt*, of the third part, the said *Andrew Daubeny*, *Thomas Cole*, and *Margaret* his wife, in consideration of £2600, assigned to *Pitt* the sum of £4000, part of the said £5000, to hold to *Pitt*, his Executors, &c., as his and their own proper monies and effects for ever.

By a subsequent Deed *Pitt* declared himself to be a Trustee, for *Daubeny*, of the monies so assigned.

*James Cockburn* died in 1809; and the Bill, filed by the representatives of *Daubeny* against Sir *William Cockburn* (the surviving Trustee in the settlement), and against *Ellis* and wife, (late *Judith Land*), charging (as against the latter) that the appointment made by Mrs *Cole* in favour of the said *Judith* was purely voluntary, and void as against the Plaintiffs (the re-

1816.

DAUBENY v. COCKBURN.

presentatives of a purchaser for valuable consideration without notice,) prayed a declaration accordingly, and an account, and payment of the £4000, with interest, by the Defendant Sir *William Cockburn;* or in case the Court should be of opinion that any valid appointment had been made, as against the Plaintiffs, of any part of the said trust monies in favour of the Defendant *Judith*, then for an account of the trust monies come to the hands of the Defendant Sir *William Cockburn*, and that he might be decreed to pay thereout what should appear to be due both to the Plaintiffs and the said other Defendants.

The Defendant Sir *William Cockburn*, by his answer, rested on the absolute invalidity of the appointment by *James Cockburn* to his daughter Mrs. *Cole*, as connected with the subsequent appointment by the latter in favour of Mrs. *Ellis*.

The Defendants *Ellis* and wife, on the contrary, insisted on the appointment to Mrs. *Cole* as a valid appointment, subject to an agreement or understanding with the father, that she should forthwith execute an appointment of part of the trust monies to Mrs. *Ellis;* and their answer went on to state, that the last mentioned Defendant lived with *James Cockburn* for many years before his death, and that the said *James Cockburn*, having always intended to make her some provision, gave her a bond for £1000, which was afterwards delivered up to be cancelled, in consequence whereof he subjected the trust monies to Mrs. *Cole*, for the purpose (among others) of enabling her to make an appointment of a part thereof to or for the benefit of the Defendant; and that, in pursuance of such intention, she did, with the knowledge and concurrence of the said *James Cockburn*, on the very

next day after the appointment had been so executed by him in her favour, make and execute the indenture of the 20th of *May*, 1796.

On the part of the Defendant Sir *William Cockburn*, Mrs. *Cole* was examined as to the circumstances under which the transactions of the 19th and 26th of *May*, 1796, took place; and her evidence (all objection to the admissibility of which was waived, on the part of Mrs. *Ellis*, by her having cross-examined the witness,) was, in substance, that for several years after her marriage with *Cole*, (who was since deceased,) she had kept up no intercourse with her father, who, in the course of the same month of *May*, meeting with *Cole* in *Bristol*, invited him to his house, and told him that, being then in immediate want of money, he would make an appointment of the £5000 in favour of his daughter, on condition of her raising thereout the sum of £400 for him the said *James Cockburn*, and assigning or making over the further sum of £1000 to or in favour of Mrs. *Ellis*. The same witness further stated that, when this proposal was communicated to her by her husband, she was at first very averse from complying with it; but afterwards consented thereto, and, accordingly, executed the assignment to Mrs. *Ellis*, which, at the time of the execution, she believed to be an assignment of the sum of £1000 only, part of the said £5000, according to the terms of the proposal, the deed not having been read over to her previously to her signing it. The subsequent assignment to *Daubeny*, by way of mortgage, was in further pursuance of the same arrangement, the sum of £400, part of the money thereby raised, having been so raised for and paid over by *Cole* to *James Cockburn*, for his own use and benefit, agreeably to the tenor of the proposal so made by him as above-mentioned.

1816.
DAUBENY
v.
COCKBURN.

Being examined by the Defendant Mrs. *Ellis*, the same witness stated that the two deeds of the 19th and 20th of *May*, 1796, were meant and intended to be one and the same transaction; that *James Cockburn* was present at the executions of the last mentioned deed by the deponent; and, after she had so executed it, took it away with him; and that she, the deponent, had no consideration for executing the deed other than such interest as she took under the appointment of the 19th.

*Hart* and *Spranger*, for the Plaintiffs.

This is the case of a father, who, having made a voluntary settlement for his family, by which certain portions are provided for each of his children, and the residue vested in Trustees upon trust for such one or more of his children as the settlor shall appoint, thinks proper, at the distance of twelve years after the date of the settlement, to execute that power of appointment in favour of one child, exclusively of the others. There is no doubt that this would be a valid execution of such a power; and that the son of the settlor, in whom the property becomes vested as one of the Trustees under the settlement, would take the property as a Trustee only, for the benefit of his sister, the appointee, and her assigns, in which situation are the present Plaintiffs. This is a clear equity in their favour; but then this son, the Defendant Sir *William Cockburn*, sets up a secret agreement between the father and daughter, by reason of which it will be contended that the appointment in her favour is absolutely invalid. It is clear, however, that, as against the settlor himself, this transaction could not have been set aside; and admitting that, where children are purchasers for a valuable consideration, no bargain can

1816.

DAUBENY v. COCKBURN.

be made by the parent in prejudice of the settlement, this principle does not apply where the settlement itself is purely voluntary on the parent's part. At all events, a purchaser for valuable consideration without notice cannot be affected by such a bargain; and we are entitled to say, on the part of these Plaintiffs, that there is no evidence of *Daubeny* (the purchaser) having had any notice of, or any reason whatever to suspect, the bargain which is set up by way of answer to their claim. No case is to be found precisely similar in all its circumstances to the present; but the circumstance of the transmission of title for a valuable consideration, and without notice, is sufficient to support the title. *M'Queen* v. *Farquhar* (a).

Sir *Samuel Romilly* and *Roupell*, for the Defendant: Mrs. *Ellis* declined to argue the question.

Sir *Arthur Piggott*, *Bell*, and *Blake*, for the Defendant, Sir *William Cockburn*.

It is contended that the evidence of fraud accompanying this transaction does not extend to affect the Plaintiff as a purchaser for valuable consideration without notice: but, in answer to this, it must be observed, that the assignment was of a chose in action, and that whoever takes such an assignment must take it subject to the equities already subsisting (b). From this it follows that if a good defence could have been made against Mrs. *Cole*, the same defence is equally valid against a purchaser of her interest. The argument in favour of the purchaser must suppose that

(a) 11 Ves. 467. *Sugden* on Powers 402.

(b) *Turton* v. *Benson*, 1 P. W. 496. Pre. Ch. 522. 2 Vern. 764, &c. *Cator* v. *Burke*, 1 Bro. 434.

1816.

DAUBENY v. COCKBURN.

Mr. *Cockburn*, who made the settlement, was himself the person who afterwards executed the conveyance; and, if it were so, and the subject of the conveyance were real estate instead of a personal chose in action, as in the present case, no doubt the statute of *Elizabeth* would have protected the *bonâ fide* purchaser. But how does it apply to the present case? A father, not indebted at the time, makes a voluntary settlement of personal property in favour of children. This cannot be affected even in favour of subsequent creditors (*a*). The purchaser, in this case, does not, however, claim under the settlor of the property, but under his appointee by virtue of the power which the settlor has himself created. The single question, therefore, in this case, is, whether the instrument under which the purchaser claims was a fraudulent execution of the power; and it makes no difference whether the settlement was or was not merely voluntary. This purchaser has not the legal estate, which is in the trustees of the settlement; and without the legal estate he can have nothing. The money is vested in the hands of these Trustees; and it is there for the benefit of that person who shall appear to be entitled to it. The Defendant Sir *William Cockburn* unites in himself the characters of Trustee and Cestuy que trust. He is both the legal and equitable owner. That a man is a purchaser for valuable consideration may be good by way of defence; but it is totally insufficient to support a claim to property in the hands of another, who holds by a prior title. Neither is it a question of notice or no notice. The execution of this power of appointment could create no legal interest in the fund, it being personal estate in the hands of Trustees. In *M'Queen* v.

(*a*) Vide *Walker* v. *Burrows*, 1 Atk. 93. *Holloway* v. *Millard*, 1 Madd. 420.

*Farquhar* (a), the appointor and appointee joined in the sale; and Lord *Eldon* was of opinion that there was not enough in this transaction (which otherwise appeared to be fair) to raise the imputation of fraud, so over-ruled the objection taken on the part of the purchaser. But that case has no application to the present, where neither assignor nor assignee have the legal interest.

The paramount title of a purchaser for valuable consideration arises out of the statute. But the 27th of *Elizabeth*, which was passed in favour of purchasers, only affects real estate; and the 13th of *Elizabeth*, which affects personal estate, is in favour of creditors, and does not extend to the case of a purchaser.

*Hart*, in reply.

I admit the distinction between the statutes 13th and 27th of *Elizabeth*. But the purchaser in this case need not resort to any statute to support his claim, which is founded on the general principle of equity, giving the preference, between two equally valid titles, to that which is prior in point of time. Now it is decided that, from the moment a power of appointment is well executed, the appointee is in by virtue of the instrument containing the power. Therefore the title under the appointment is preferable to that which only arises in default of appointment. With regard to the possession of the legal estate giving the preference, the execution of a power of appointment gives to the appointee at least a mixed title, which, if not strictly legal, is not merely equitable; and, therefore,

(a) 11 Ves. 467.

1816.

DAUBENY v. COCKBURN.

within the rule affording preference to priority in point of date only.

The fraud objected in this instance, can affect only those who were *participes criminis*.—In such cases where the Court says, the appointment shall not take effect, it means only that it ought not to prevail so as to give a benefit to the appointee. In this case, taking the several instruments together, as it is contended they ought to be taken, it amounts to this—the donee of a power and his appointee concurring in an assignment to a *bonâ fide* purchaser. This is the very case of *M'Queen* v. *Farquhar* (a). The interests of creditors are entitled to the protection of the Court, at least equally with those of the voluntary objects of the power created by this settlement. But in *George* v. *Milbanke* (b), the purchaser under a voluntary appointment was held to have a preferable equity to the creditors.

*The* MASTER *of the* ROLLS.

Upon the two first points in this case I am ready to give my opinion. There is a third, which I wish to be further spoke to.

In the first place, it is impossible to doubt that the two deeds (of the 19th and 20th of *May*, 1796,) were parts of the same transaction, and that the appointment to Mrs. *Cole* was made on condition of her subsequent appointment to Mrs. *Ellis*. It was, therefore,

(a) 11 Ves. 467. (b) 9 Ves. 190.

*pro tanto*, an appointment to the father himself, or to a perfect stranger; and, as such, clearly void.

*Secondly*, That the original settlement was merely voluntary, can make no difference. From the moment the deed was executed, he was as much bound by it as if it had originated in reciprocal contract.

The only question that remains is, Whether the appointment is void *in toto*, or in part only; and, as to this, it is said that fraud vitiates the whole transaction. I thought the argument strong in support of this position; but, on looking into the cases, I find two in which fraudulent appointments have been only partially set aside.

In *Lane* v. *Page* (*a*), the second question was, Whether the execution of the power was void *in toto*, or good to the extent of the annuity of £20 to the wife, who was the legitimate object of the appointment; and it was declared to be good to that extent. In that case Lord *Hardwicke* says, "I am not clear that, where there is a power of appointment to children, and part is appointed fraudulently, the whole appointment is void. I cannot say it is so."

The case of *Aleyn* v. *Belchier* (*b*) was very similar in its circumstances to the former, except that the appointment was made after marriage; and it was held sustainable to the extent of the provision made for the wife, but set aside so far as the creditors were intended to derive any benefit from it.

(*a*) Amb. 233, *Sugden* on Powers 400; and Appendix 676, under the name of *Lane* v. *Terry*.

(*b*) *Sugden* on Powers, Appendix 677.

1816.

DAUBENY v. COCKBURN.

I wish to have it considered whether these cases can be at all; and, if so, how far, and in what respects, distinguished, in point of principle, from the present. If not, and if the appointment is good to any extent, to that extent the Plaintiff must be entitled. But this Plaintiff contends for much more. He says that the payment of a valuable consideration sets up the appointment, *quoad* himself as a purchaser. I cannot, however, think that the payment of a consideration to Mrs. *Cole* could have any such effect. Setting aside the circumstance, that Sir *William Cockburn* has the legal estate, it is enough for the present purpose that it is not in the Plaintiff, and was not in Mrs. *Cole*; that there are only equities to deal with. If the appointment be such, that a Court of Equity will hold it did not vest any thing in Mrs. *Cole*, how could it devest any thing out of Sir *William Cockburn*? The payment of a money consideration cannot make a stranger become the object of a power created in favour of children. He can only claim under a valid appointment executed in favour of some, or one, of the children. An appointment, at first impeachable as voluntary, may *ex post facto* be turned into an appointment for a valuable consideration;—but that is, where a valuable consideration was all that was wanting to have made it good *ab initio*. As, in the case of a conveyance of a man's own property, or an appointment of property over which he has a power unlimited as to objects, he who pays a consideration to the voluntary appointee may constructively be held to be in the same situation as if he had in the first instance paid it to him by whom the estate has been granted, or the power executed.

Payment of a valuable consideration by a person, not having the legal estate, and not being an object of the power, cannot set up an invalid appointment, in favour of such purchaser.

*Secùs*, where the power is unlimited as to its objects, and the appointment is only impeachable on the ground of its being voluntary.

This was the case in *George* v. *Milbanke* (a), where

(a) 9 Ves. 190.

there was an absolute unlimited power of appointment well executed in favour of a volunteer, and an assignment by way of mortgage from the appointee. The assignee was held to have a valid claim, to the extent of the money advanced by him; and he might, by the payment of a valuable consideration, have acquired an absolute and indefeasible interest in the whole. But, where there is fraud, the payment of money cannot make the appointment cease to be fraudulent, although it may make it cease to be voluntary.

It is to be observed, too, that, in *George* v. *Milbanke*, the claim of the assignee was allowed to prevail, not against persons who had antecedently any specific estate or interest in the subject of the appointment, but against creditors who had only a general equity to have what is appointed to a volunteer considered as assets, if wanted, for the payment of debts. The *Lord Chancellor*, after stating the question to be, "Whether, being not a volunteer, but a purchaser, creditors having no specific charge on the property have as good an equity," adds, "I think they have not" (*a*). But, here, Sir *William Cockburn* has a specific interest under the deed of 1781, which it is endeavoured to take from him by the posterior equity alleged to arise from the payment of money to Mrs *Cole*; to whom, for the sake of the argument, I now assume that no interest whatever passed.

If, however, it can be made out that the appointment was good to the extent in which Mrs. *Cole* was benefited by it, so far the purchaser will be entitled to stand in her place. And this is the point which I desire to have further spoken to.

(*a*) 9 Ves. 196.

1816.

DAUBENY v. COCKBURN.

*July* 26.

On this day, agreeably to His Honor's request, the Cause came on again upon the point reserved for argument.

For the Plaintiff,

*Alexander* v. *Alexander* (*a*) was cited, and the cases collected by Mr. *Sugden* in his Treatise on Powers (*b*) referred to, in which it was stated to be clear that the party executing the power would not have executed it but with a view of reserving to himself a benefit. So also, *Palmer* v. *Wheeler* (*c*).

For the Defendant Sir *William Cockburn*.

In the last case cited, the appointee was the person who would have taken in default of appointment. The others are cases of jointure, and stand altogether on a different principle, the wife being a purchaser for valuable consideration, if she brought a fortune to her husband, or, if not, marriage is itself a valuable consideration. The contract to which she was privy was a fraud, therefore, upon herself only, and the appointment decreed to be set aside only so far as it was in favour of the donee of the power. The cases in which the execution of powers has been held void only as to the excess, are also of a distinct description. As where a parent having power to appoint among child-

(*a*) 2 Ves. 640, 644. Vide *Hamilton* v. *Royse*, 2 Scho. and Lef. 315.

(*b*) 2d Ed. p. 400. *Lane* v. *Page*, *Aleyn* v. *Belchier*.

(*c*) 2 Ball and Be. 18.

1816.

DAUBENY
v.
COCKBURN.

ren only, appoints a part to grandchildren (*a*), or annexes a condition that the child to whom he has appointed shall give to grandchildren. This is a fraud only upon the innocent objects of the power; and its execution is, therefore, held void only for the excess. Here, the corrupt contract is of the very essence of the transaction. The one would never have taken place without the other; and the only object of the power deriving any benefit from its execution is herself a party to the fraud committed on all the other objects of it. It is impossible not to foresee the consequences of a Court of Equity allowing such a contract to take effect. It would be to authorize a species of traffic between a parent and his children, the objects of a power of appointment vested in him,—which of them will bid highest for an exclusive preference over the others.

If *Alexander* v. *Alexander* (*b*), (where, the appointment being made to several objects, some of whom were capable, others not, it was decided that those who were capable should take the whole,) were to be held as establishing a principle applicable to cases like the present, then *Lane* v. *Page* would have been improperly determined; for the wife ought, in that case, to have taken the whole. But, on the contrary, it was held that the fraudulent agreement vitiated the appointment, except to the extent of the benefit actually intended for the object of the power. And, even as to that, a part of the benefit being contingent and uncertain in amount, and a part only immediate and explicit, the validity of the execution was restrained to the latter portion.

(*a*) See *Sugden* on Powers, p. 529. *et seq.*

(*b*) 2 Ves. 640.

The case of *Palmer* v. *Wheeler* (*a*), so far as it is at all applicable to the present case, is an authority in favour of this Defendant. For there the son, whom it was attempted to charge with the consequences of the fraud practised, as *Particeps Criminis*, had himself been the subject of fraud and imposition on the part of the parent; and it was expressly on this ground that the appointment, so far as it was for his benefit, was established.

With regard to the particular case before the Court, there is perhaps none to be found that comes up to it in all its circumstances; and, in which way soever it is decided, it will unquestionably constitute a leading authority on the subject.

*In reply*

The evidence does not go the length of affecting Mrs. *Cole* as *Particeps Criminis* in this case, any further than her merely having joined in the transaction in itself amounts to such evidence. Considered as a child acting under the influence of a parent, the Court ought not to contemplate her inclination as going along with the fraudulent appointment, of the execution of which she was probably made an unwilling instrument.

Then, is not a child, the object of such a power, as much an object of favour to the Court as a wife, in favour of whom there exists a jointuring power? Or rather, is she not far preferable to a wife who contracts marriage, as in the case of *Lane* v. *Page* (*b*), not for

(*a*) 2 Ba. and Be. 18.

(*b*) See the facts of this case as stated in *Sugden* on Powers, App. p. 676, under the name of *Lane* v. *Terry*.

1816.

DAUBENY v. COCKBURN.

the purposes of marriage, but with a direct view to the fraud which is subsequently committed? That, surely, was a transaction which a Court of Equity would treat with as much severity as any that can be supposed; yet, even there, so far as the appointment was for the benefit of the wife, the power was held to have been well executed.

---

*The* MASTER *of the* ROLLS.

*July* 29.

I thought so much respect due to the *dicta* imputed to Lord *Hardwicke* in the case of *Lane* v. *Page* (*a*), as to pause upon the decision of a point, with regard to which he seemed to entertain an opinion different from that with which I was impressed. It seemed to me, that those *dicta* could hardly be supposed to refer to a fraud in which the child had no concern, as such a case would have been irrelevant to that before him, where it was the wife's participation in the alleged fraud that could alone create a doubt whether her jointure could be affected.

No part of a fraudulent agreement can be supported, except where a consideration has been given, in consequence of which the parties cannot be replaced in the same situation.

However, upon principle, I do not see how any part of a fraudulent agreement can be supported, except where some consideration has been given, that cannot be restored; and it has, consequently, become impossible to rescind the transaction *in toto*, and to replace the parties in the same situation.

In the case of *Lane* v. *Page*, the subsequent marriage formed such a consideration on the part of the wife. In the case of *Aleyn* v. *Belchier*, where

(*a*) Amb. 233.

1816.
DAUBENY v. COCKBURN.

the appointment was subsequent to the marriage, it can hardly be said to have been decided that the appointment was good in any part. For it appears by the Register's book (*a*) that the bill contained a submission to pay the annuity to the wife, and only sought relief against the other objects of the appointment.

In ordinary cases of fraud, equity undoes the whole transaction, and replaces the parties in their former situation.

In ordinary cases of fraud, the whole transaction is undone, and the parties are restored to their original situation. If a partially valuable consideration has been given, its return is secured as the condition on which equity relieves against the fraud. But, in such a case as the present, the appointment of any particular proportion to any particular child is a purely voluntary act on the part of the parent; and, although as good, if fairly made, as if the consideration were valuable, yet what is there that a Court can treat as a consideration which must be restored if a fraudulent appointment be set aside, or as incapable of restitution, and, therefore, support the appointment so far as it is for the child's benefit?—To say, It is to be supported to that extent, would be to say that the child shall have the full benefit of the fraudulent agreement. Mrs. *Cole* would have all she bargained for; and it would be no hardship upon her that the appointment to Mrs. *Ellis* should be set aside. Either, then, you must hold that a child, giving a consideration for an appointment in its favour, is guilty of no fraud on the power; or you must wholly set aside the appointment procured by the fraud. Now, although the father, in proposing such a bargain, is much more to blame than the child in acceding to it, still it is impossible to say that an appointment, obtained by means of such an agreement, is fairly obtained. It is a fraud upon the

Agreement by one of the objects of a power to return part in consideration of an appointment

(*a*) *Sugd.* on Powers, App. 677.

other objects of the power, who might not, and in all probability would not, have been excluded, but for this agreement. It is, more particularly, a fraud upon those who are entitled in default of appointment; for *non constat* that the father would have appointed at all if the child had not agreed to the proposed terms.

1816.

DAUBENY v. COCKBURN.

in its favour is a fraud, in the appointee as well as in the appointor, both on the other objects of the power, and on the party who is to take in default of appointment.

*Secus*, where the appointee is not privy to the corrupt agreement.

This cannot be likened to the case of a condition introduced into an appointment to which the child is not at all privy. How can it be said that the child, in such a case, has done, or agreed to do, any thing in order to obtain an unfair preference over others? In this case, as far as appears, Mrs. *Cole* owed every thing to the agreement. Be it that the father dictated the terms, and that the daughter gave a merely passive assent; I see nothing in the evidence from which I can collect that, but for such assent, any appointment whatever would have been executed in her favour. There seems, therefore, to be no ground on which the appointment can, to any extent, be supported.

The Bill must be dismissed, but I do not think it a case for costs.

1816.

Rolls, July 29.

## SANFORD *v.* RAIKES and CHICHESTER. CHICHESTER *v.* SANFORD.

Testator contracts for the purchase of a house, and afterwards by a codicil to his will gives to *A.*, his Executor, "the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down." This amounts to a direction that the purchase money for the house shall be so provided for; and evidence was admitted to shew what was the order given by the Testator with reference to the cutting of timber.

SIR *John Chichester*, Bart., by his Will, dated the 28th of *May*, 1808, gave to the Plaintiff, *Sanford*, a legacy of £1000, and appointed him his Executor.

In *August* following, the Testator entered into a treaty with the Defendant, *Raikes*, for the purchase of a house in *Seymour-place*; and, on the 28th of that month, the following memorandum of agreement was reduced into writing, and signed, by the Defendant. "I hereby agree to sell to Sir *John Chichester*, Bart., all my right, title and interest, in a certain leasehold house and premises situate and standing in *Seymour-place*, and numbered 4, together with all the fixtures thereunto belonging, at and for the sum of £7350, and to deliver possession of the same on or before the 29th of *Sept.* next, on receiving from the said Sir *John Chichester* the said sum of £7350, on or before the day above-mentioned."

On the 30th of the same month of *August*, 1808, the Testator, being then resident in *London*, sent the following notice to his land-agent in *Devonshire*. "Sir, I wish to have timber cut down on my *Youlston* estate, to the amount of £10,000, in the manner Mr. *Hole* shall direct."

On the 3d of *September*, 1808, the Testator made the following codicil to his Will, so as to pass real estates. "I give the house in *Seymour-place*, which I have given a memorandum of agreement to purchase,

(and which is to be paid for out of timber which I have ordered to be cut down,) to the Rev. *John Sanford*" (the Plaintiff).

The Testator died shortly after the date of this codicil, leaving Sir *Arthur Chichester*, one of the Defendants to the original, and Plaintiff in the cross bill, his heir at law, who on his death became entitled to the *Youlston* estate, and entered into possession accordingly.

The original Bill prayed a specific performance by *Raikes*, and, against the heir at law, that he might be compelled to cut down timber to the amount of £10,000, in pursuance of the direction given by the Testator to his land-agent, in Order that the Plaintiff might thereout be enabled to pay the purchase money.

The Defendant *Raikes*, having, by his answer, submitted to complete the contract upon being paid the amount of the purchase money together with certain other sums which he stated to have been agreed to be taken by the Testator for furniture and fixtures; by an Order made in the original cause, on the 15th of *January*, 1810, it was ordered "that the Plaintiff (*Sanford*,) should be at liberty to pay to the Defendant *Raikes* the sum of £7350, (being the amount of the purchase money for the house in *Seymour-place*, contracted to be purchased of him by the said Sir *John Chichester*,) together with the interest due thereon, at the rate of 4 *per. cent.* per ann., out of the personal estate of the said Sir *J. C.* in the hands of the Plaintiff, as his Executor, together also with the sum of £376 11*s.* 6*d.* (being the amount of furniture, &c.;) but such payments were to be without prejudice

1816.
SANFORD
v.
RAIKES.

to the claim of the Plaintiff upon the other Defendant for the amount of timber directed by the said Sir *J. C.* in his lifetime to be cut down for the purpose of completing the contract for the said purchase."

The purchase was afterwards completed agreeably to the terms of this order; and, the original cause coming on upon further directions, His Honor, the *Master* of the *Rolls*, directed that it should stand over, with liberty to file a cross bill, and to examine witnesses.

A cross bill was afterwards filed accordingly by the heir at law, Sir *Arthur Chichester*, against *Sanford*, representing that the paper signed by *Raikes* was only a proposal on his part to sell, and not an agreement adopted or acted upon by the Testator: but this was met by evidence on the part of the Defendant of another paper, or memorandum in writing, since lost, which was said to be signed by the Testator, and by which he accepted the proposal so made.

Sir *S. Romilly* and *Courtenay*, for the Plaintiff in the original Bill.

*Bell* and *Parker*, for the Defendant, Sir *Arthur Chichester*.

For the Defendant, the following points were made:

*First*, That Sir *John Chichester* (the Testator) was not, at his death, bound either at law or in equity, to complete the alleged agreement for the purchase of the house in *Seymour-place*, inasmuch as the testamentary paper, proved as a codicil, referred to a memorandum signed by the Testator, when there was no evidence

of any such memorandum having ever existed; and the instrument itself was insufficient to supply the want of such evidence. *Buckmaster* v. *Harrop* (a), *Rose* v. *Cunyngham* (b), *Broome* v. *Monck* (c).

*Secondly*, That, supposing the Testator was bound by the contract, his heir at law was not affected by the incidental mention of the timber in the codicil, which could not be taken as intended to convey any beneficial interest in that timber; and that the incidental recital of an intention could not operate to disinherit an heir at law, which can only be done by express words, or by plain and necessary implication. *Wright* v. *Wyvill* (d), *Right* v. *Hammond* (e), *Upton* v. Lord *Ferrers* (f), *Dashwood* v. *Peyton* (g), St. *John* v. Bp. of *Winchester* (h), *Thomas* v. *Thomas* (i).

*Thirdly*, That, supposing the Testator to have had any intention with respect to timber, the codicil does not certainly refer to any particular timber, and cannot be made certain by evidence *aliunde*. As Lord *Eldon* says, in *Smart* v. *Prujean* (k), "An instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court *can* be under no mistake." And see *Wilkinson* v. *Adam* (l), *Boydell*

(a) 7 Ves. 341. 13 Ib. 417.
(b) 11 Ib. 550.
(c) 10 Ib. 597.
(d) 2 Ventr. 56.
(e) 1 Comyns 232.
(f) 5 Ves. 801.
(g) 18 Ib. 27. See acc. 2 Lebn. 70. 2 Vern. 451. 8 Vin. Ab. 71. pl. 20. 261. 356.
(h) Cowp. 99.
(i) 7 T. R. 676.
(k) 6 Ves. 565.
(l) 1 Ves. and B. 423. (7 East 568.)

1816.
SANFORD v. RAIKES.

v. *Drummond* (a). That, unless the Court could find with certainty what was "*the* timber" to which the Testator referred, it would be impossible to effect the intention. *Wilson* v. *Mount* (b), *Roe* v. *Vernon* (c), *Doe* v. *Parkin* (d).

Some stress was also laid on the circumstance that the words of the codicil "which is to be paid for out of timber which I have ordered to be cut down" were expressed in a parenthesis, as affording an inference that the Testator did not mean those words to be construed as imperative, but merely as reciting an intention which he never carried into effect.

*The* MASTER *of the* ROLLS.

*July* 29.

Three questions have been made in this cause:

*First*, Whether Sir *John Chichester* signed the agreement.

*Secondly*, Whether the Will contains a direction that the house shall be paid for out of the timber ordered to be cut down.

*Third*, Whether evidence can be received of the order for cutting down the timber referred to in the Will.

The first, if any serious doubt could be entertained upon it, would be the proper subject of an issue. But

(a) 11 East 142.
(b) 3 Ves. 191.
(c) 5 East 51.
(d) 5 Taunt. 321.

1816.

SANFORD v. RAIKES.

I apprehend that no jury would, upon such evidence as there is before the Court, have a moment's hesitation in finding that the agreement was signed by Sir *John Chichester*. Putting myself in the place of a jury, I have not the slightest doubt of the fact.

The meaning of an ambiguous Will to be collected from the words and the context, not from the punctuation.

As to the second question, the decision of it cannot depend on the grammatical skill of the writer of the Will in the position of the characters expressive of a parenthesis. It is from the words, and from the context, not from the punctuation, that the sense must be collected. The question then is, Whether the words "and which is to be paid for out of timber which I have ordered to be cut down" import that it was the then declared will and intention of the Testator that the house should be so paid for, or merely that he expected or supposed that it would be so paid for, independently of any intention he might then express on the subject. When he who has a right to order that any particular thing shall be done, says, in a testamentary disposition, that it is to be done, I know not upon what principle it is that he is to be understood as speaking not imperatively, but narratively—not as giving a direction, but as stating a position. In each of the cases that were cited, the supposition of antecedent right was expressly stated; and it was therefore plain that the Testator did not mean to give by his Will what he knew, or believed, to belong already to the person spoken of, by some other title. Where the supposition was erroneous, it was evident enough that the Testator would have so devised if he had known the true state of the case; but an erroneous reason for not devising could not be held to amount to a devise. In *Dashwood* v. *Peyton* (a), which is cer-

Testator, having a right to order a thing to be done, expressing in his Will that it is to be done, must be understood to speak imperatively, and not merely by way of recital.

(a) 18 Ves. 27.

1816.

SANFORD v. RAIKES.

Erroneous reason for not devising cannot be held to amount to a devise.

tainly a strong case, there was, however, an express reference to a supposed direction in the uncle's Will, which direction the Testator wished to be complied with. The very supposition, that it was his uncle's direction that was to operate, shewed that he did not conceive it to be either necessary or competent for him to give any direction of his own upon the subject. But what is there in this Will to shew that the Testator conceived the produce of the timber would be applicable to the payment for the house, otherwise than by such direction as he might then give for the purpose? He says, the house is to be paid for out of the timber. That is an expression of the Testator's Will that it shall be so paid for. There is no allusion to any other mode, actual or supposed, by which the devisee could have the house paid for in that manner. Till Sir *John Chichester* came to devise the house, the appropriation of any particular part of his property to the payment of the price would have been nugatory. He was alike master of all his funds, and might apply them all as he thought fit. Any intention he might at one moment have had as to the means of providing for the price of the house, might have been abandoned the next. But, when he was to devise a house not yet paid for, he might have been imposing a burthen, instead of conferring a benefit, if he had not given an express direction for the payment of the price. Such direction he therefore gives, by declaring that it is to be paid for out of the timber. He could not possibly suppose that the devisee had any antecedent right to have it so paid for; and, therefore, it is impossible to liken this to the cases where a reference to a right supposed already to exist in another has been held not to operate as a devise. The cases about devise by implication seem to have, if possible, still less bearing on the present. Here the Testator's inten-

This, not a case of reference to a supposed, non-existent, right, which has been held not to operate as a devise; nor of devise by implication.

tion is not collected by inference. It is distinctly expressed. The argument admits that, when he made the codicil, he did intend that the house should be paid for out of the timber-money; but it insists that he did not mean, by the codicil, to declare such intention. That really comes to a *protestatio contrà factum*. The declaration is contained in the codicil. There is no reference to any thing out of the codicil; and yet it is to be said that it is not by the codicil that the intention is declared.

Where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence must be admitted to ascertain the fact, and so ascertain the subject of the devise. Different from the cases of reference to a paper which is to form part of the Will, where the Will itself must specify the paper to be incorporated with it.

As to the third question; the timber, out of which the house is to be paid for, is the timber which the Testator says he had ordered to be cut down. I had always understood that, where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascertain the fact, and, through that medium, to ascertain the subject of the devise. I do not see what this has to do with cases where there is a reference to some paper that is to make a part of the Will. There it may be contended that the Will itself must specify the paper that is to be incorporated into it. Here the question is, not upon the devise, but upon the subject of it. Nothing is offered in explanation of the Will, or in addition to it. The evidence is only to ascertain what is included in the description which the Testator has given of the thing devised. When there is a devise of the estate purchased of *A.*, or of the farm in the occupation of *B.*, nobody can tell what is given, till it is shewn by extrinsic evidence what estate it was that was purchased of *A.*, or what farm was in the occupation of *B.* In this case, the direction with regard to the payment for the house amounted in effect to a devise of so much of the produce of the timber ordered to be

1816.

SANFORD
v.
RAIKES.

cut down, as should be sufficient to pay for the house. What is there in the fact here referred to,—viz. an antecedent order for cutting down timber,—that makes it less a subject of extrinsic evidence, than such an one as I have alluded to? The moment it is shewn that it was a given number of trees growing in such a place, or ten thousand pounds' worth in value of the timber on such an estate, that the Testator had ordered to be cut down, the subject of the devise is rendered as certain as if the number, value, or situation of the trees had been specified in the Will.

The Plaintiff is, therefore, entitled to have so much timber cut down as will be sufficient to pay for the lease of the house.

Decree for the Plaintiff, with costs, and interest at £4 *per cent.*

ROLLS,
*May* 31, 1811.

KING'S BENCH,
*June* 9—12,
1812.

ROLLS.
*Sittings after Trinity Term,*
1815.

Testator devised freehold fee-simple estates in *pos-*

## MOGG *v.* MOGG.

GEORGE *Hodges* (a) was, at the date of his Will, and at his death, seized in fee-simple of a manor and other hereditaments in the parish of *Littleton*, (distinguished by the name of the *Littleton freehold estates,*) and of freehold lands and hereditaments in several other parishes, (called the *Mark Estate*). He was also seized of copyholds in the parish of *Timsbury*, and in several other parishes, in some of which he had an estate in fee, in others for lives only. He had also estates for life or lives in cer-

(a) See the Pedigree at the end of this case.

tain leasehold premises in *Timsbury* and other parishes, in some of which the leases were renewable by custom. Lastly, he was possessed at the time of his death, of leaseholds for years in *Timsbury* and other parishes. Under some of the freehold lands, there were coal-mines,

*session* to all and every the child and children of his daughter, *S. M.* for life; and after the decease of such child and children, to the lawful issue of such child and children to hold to such issue, his, her, and their heirs, as tenants in common; and and in default of such issue, over to other persons; *S. M.* had nine children, four born in the Testator's life, and five after his decease: *held* that all the nine took under this devise as tenants in common in tail with cross remainders.

Testator devised other freehold fee-simple estates to Trustees during the life of his son, *J. H.* upon certain trusts, remainder to his son's children and their issue, in the same words as in the above devise to his daughter's children, and in default of such issue, to all and every the child and children of his daughter, *S. M.*, &c. (in the same words as before): *held* that only six of the nine children of *S. M.* took under this devise; namely, five who were born, and one who was *en ventre* at the death of *J. H.*

Testator devised other freehold fee-simple estates to his widow for life, and after her decease, to the same uses as in the deviso last stated: *held* that all the nine children of *S. M.* took under this devise, all being born in the widow's life.

Testator devised other freehold fee-simple estates to Trustees during the life and lives of the child and children, &c. of *S. M.* in trust, to apply the rents for their maintenance; and after the decease of such child and children, he devised this estate to the lawful issue of such child and children, &c. in the same words as before: *held* that all the nine children took under this devise equitable interests for their lives, and the life of the survivor of them, and that on the decease of the survivor, the estate would go over to the issue of the four children born in Testator's life, by purchase as tenants in common in fee.

Testator also bequeathed leaseholds for lives and years, in the same manner as last stated, the legal estate being in the Trustees: *held* that all the nine children took in equal shares, that they took absolute interests in the leaseholds for years, and estates in the nature of estates tail in the leaseholds for lives; and that the limitations in the latter property were barred by deeds executed by some of the children.

1815.

Mogg v. Mogg.

and veins of coal, both opened and unopened, at the time of his death; and the Testator was also entitled, at the date of his Will and his death, to shares in several other coal-mines situate under lands of which he was not owner; some of them held in fee, and others for years.

Will of *George Hodges.* Devise of the *Littleton freehold estates.*

By his Will, dated the 19th of *August*, 1759, the Testator devised the *Littleton freehold estates* to *Baker* and *Hooper* (Trustees), to and upon the uses and trusts after mentioned, "that is to say, all coal-mines, veins of coal, and coal-works in, upon, and under the same excepted," to the intent that his wife, *Martha Hodges* (a), might hold the dwelling-house and certain other tenements thereon for her life; and, as to the *residue*, to the use of the said Trustees and their heirs, during the life of his son, *John Hodges* (b), in trust to let the estates, and apply the rents in manner following:—that is to say, £150 *per ann.* to be paid thereout to the said *John Hodges*, during his life, and the overplus, (charged with an annuity of £100 to his wife, and with the sum of £1500 afterwards directed to be raised) to be invested, and the produce paid to and among the children of his daughter, *Sarah Mogg*, begotten and to be begotten, until a child or children should be born to his son, *John Hodges* (c); then to such child or children during his said son's life; and, after his death, the principal and accrued interest to go among his children; but, in case he should have no children, then to pay and divide the said principal and accrued interest "unto and equally among the child

(a) *Martha Hodges*, the widow, survived the Testator, and died in 1775.

(b) *John Hodges*, the Testator's son and heir at law, survived him, and died in 1765, without issue.

(c) Which event never happened.

and children begotten, and to be begotten, on the body of his said daughter, who should be living at his said son's decease; if no such child then living, to go to his daughter, *Ann Harding*, or her children; and if she should be then dead without issue, to other persons therein named. The Will then proceeded as follows:—"And from and after the decease of my said "son I give and devise such *residue* of my said messuages, &c. in *High Littleton*, (subject and chargeable "also in the first place by the issues and profits thereof, "with or towards the payment of the yearly sum of "£100, and the sum of £1500 hereinbefore and hereinafter mentioned,) unto and equally among the child "and children lawfully to be begotten by my said son "during his, her, and their life and lives. And from "and after the decease of such child and children, I give "and devise the same unto the lawful issue of such "child and children, to hold unto such issue, his, "her, and their heirs as tenants in common without "survivorship; and in default of such issue, I give "and devise such *residue* of my said messuages, &c. "unto and equally among the child and children begotten "and to be begotten on the body of my daughter, *Sarah* "*Mogg*, during his, her, and their life and lives; and "from and after the decease of such child and children, "I give and devise the same unto the lawful issue of "such child and children of my said daughter, *Sarah* "*Mogg*; to hold unto such issue, his, her, and their "heirs as tenants in common without survivorship; and "in default of such issue," to his daughter, *Ann Harding*, for life; and, after her decease, to her children and their issue, (using the same words as with reference to Mrs. *Mogg*'s children,) and in default of such issue, to certain other persons in fee. "And as touching and "concerning the several messuages, &c. above given "to my said wife, I hereby will and direct that the same

Mogg v. Mogg.

"shall, from and after the death of my said wife, stand "and be limited to and for the same use and uses that "are above declared concerning the *residue* of my said "messuages, &c."

Devise of the *Mark* estate.

The Testator then devised the *Mark Estate* (a), (coal-mines, &c. excepted), charged as before with the £100 annuity, and £1500, to the same Trustees, in trust that they should "equally pay and apply the "issues and profits thereof towards the support and "maintenance of the child and children, begotten and "to be begotten, of his said daughter, *Sarah Mogg*, "during his, her, and their life and lives;" and after the decease of such children, "he gave and devised the "said estate to the lawful issue of such child and "children of his said daughter, *Sarah Mogg*, to hold "unto such issue, his, her, and their heirs as tenants in "common without survivorship;" and, in default of such issue, to the children of his son and their issue successively in like manner; and, in default of such last mentioned issue, to his daughter, *Ann Harding*, her children, and their issue successively in like manner.

Devise of the leaseholds and copyholds.

The Testator then gave to the same Trustees (b) all his copyhold and leasehold estates, (except the leasehold and copyhold estates at *Timsbury*, which he thereby directed to be enjoyed with the *Littleton* estate during the whole of his interest therein,) chargeable as aforesaid, upon the same trusts for the children of *Sarah Mogg*, with a devise to their issue, in the same

(a) See *infrà*, as to the fictitious division of the subject of this devise into the *Upper* and *Lower Mark* estates, and the clause thereupon introduced into the case stated for the opinion of the Court of K. B.

(b) See *infrà*, as to the alteration made in this devise,

Moss v. Moss.

words as those of the *Mark* estate; and, in default of such issue, to his son and his daughter, *Ann Harding*, as tenant in common, without survivorship.

Devise of coal-mines.

The Testator then gave and devised to the same Trustees (*a*) all coal-mines and veins of coal in or under his freehold estates, upon trust to lease for any term or terms of years, reserving the best *free shares*, and so as such lessees be not made dispunishable for waste; and he directed that such *free shares*, (chargeable as aforesaid,) should be applied to the uses already declared as to his leasehold and copyhold estates, and gave and bequeathed all his "share and shares, interest and interests, of and in all coal-mines, veins of coal, and coal-works then at work in the said county of *Somerset*," to the same Trustees in fee upon the same trusts as above declared concerning his copyhold and leasehold estates, also chargeable (as to the produce thereof) as aforesaid.

The Testator then bequeathed the annuity of £100 to his wife for her life, in compliance with a covenant in his marriage settlement; and he gave the £1500 (so as aforesaid charged on the premises,) to his son-in-law, *John Harding*, upon a certain condition; and, in case of non-compliance therewith, the Trustees were to raise the said sum out of the premises.

Residuary bequest.

Lastly, after giving certain pecuniary legacies, the Testator bequeathed the residue of his personal estate to the same Trustees, upon trust to dispose of the same, and to apply the produce (after payment of his

in the case stated for the Court of K. B.

(*a*) See the alteration in this devise *infrà*.

debts, funeral expenses, and legacies,) towards raising the £1500; and, as to the overplus, (if any,) to the child and children of his said daughter, *Sarah Mogg*, their executors and administrators, share and share alike. And he appointed the same Trustees executors of his Will.

The Testator died in 1762, leaving *John Hodges*, his son and heir at law, who died in 1765, without ever having had a child. The Testator's widow survived him, and died in 1775. *Sarah Mogg*, (one of his daughters,) had nine children, of whom *Martha*, 1, and *Richard*, 2, were born before the date of his Will; *George*, 3, and *Thomas*, 4, were born after the date of his Will, but before his death; *Jacob*, 5, was born after the Testator's death, but before the death of *John Hodges; Charles*, 6, was *in ventre sa mere* at the death of *John Hodges*; and *Robert*, *Henry*, and *Dorothy*, 7, 8, and 9, were born after the death of *John Hodges*; but all the children were born in the lifetime of the widow.

All the children lived to attain twenty-one. *Martha* married *Barter*, and died in 1805 without issue. *Richard* died in 1792, intestate, leaving two daughters, *Martha* and *Sarah*, his heirs at law, who were also the heirs at law of the Testator. *Thomas* died in 1803, without issue. The other six children were still living; and three of them, (viz. *Charles*, *Henry*, and *Dorothy*, wife of *Kingsmill*,) had issue.

The four children born in the Testator's lifetime had done no act to alter their estates under the Will; but the five born after his death had suffered recoveries, each on attaining twenty-one, of one-ninth of

the freehold estates: the uses whereof were limited to themselves in fee.

The Trustees and Executors administered the personal estate, and granted leases of some of the coal-mines; but had not otherwise acted.

In Easter Term 1810, *Jacob*, *Charles*, and *Robert*, (three of the after born children,) filed a Bill against the other children, and their issue, and the representatives of such of them as were deceased, and others claiming an interest, by settlement and otherwise, in their respective shares, praying that the rights of the parties under the Will might be declared, a partition of the devised estates, and an assignment of the leaseholds.

*May* 31, 1811.

The Cause coming on to be heard at the Rolls, His Honor directed a case to be stated for the opinion of the Court of King's Bench. Some of the clauses in the Will of the Testator being so expressed as to afford ground for argument, that the whole legal estate passed to the Trustees (which construction would have prevented the Court of law from giving any opinion as to the effect of the devises to the children of *Sarah Mogg*,) certain alterations were made in the case in the statement of the Will; and, in particular, with respect to the *Mark Estate*, it being necessary, (in order to ascertain the situation of the equitable interests,) to find, not only what estate the Trustees took therein, but also which of the children would have been entitled if the devises to them had been of the legal estate in possession, that devise was stated twice; a fictitious gift (omitting the gift to the Trustees) being introduced as applicable to an estate called in the case the

Mogg v. Mogg.

*Upper Mark Estate*, and the real devise retained as applicable to an estate [illegible] the *Lower Mark Estate*.

Accordingly, by the fictitious clause' in question, this, *Upper Mark Estate* was stated to be devised, (chargeable with the £100 per ann. and £1500,) to the children, begotten and to be begotten, of *Sarah Mogg*, during their lives; then to their issue, as tenants in common; and, in default of such issue, to the children of his son, *John Hodges*, and their issue, and to *Ann Harding* and her issue, successively, following the words of the Will with respect to the last mentioned limitations.'

Another alteration made in the statement of the case was as follows:—The devise of the leasehold and copyhold estates, instead of being to the Trustees upon the trusts of the *Mark Estate*, was represented as a devise, "so that the issues and profits might belong "to" the children of *Sarah Mogg*, and so on as before: and in stating the devise of the coal-mines, the gift to the Trustees was omitted.

The questions referred to the Court of King's Bench upon the case so stated, were as follows:—

I. Whether *Martha* and *Richard* (the two children of *Sarah Mogg*, born at the date of the Will,) took under the devises to them any and what estates' in any and what shares of the several properties above enumerated?

II. Whether *George* and *Thomas*, (the two children of *Sarah Mogg*, born in the lifetime of the Testator, but after the date of his Will,) took under the

devises to them any and what estates in any and what shares of the several properties enumerated?

III. Whether the five children of *Sarah Mogg*, born after the death of the Testator, took under the devises to them any and what estates in any and what shares of the several properties?

IV. Whether the grandchildren of *Sarah Mogg*, (being the issue of such of her children as were living at the date of the Will, or of such of her children as were born after the date of the Will, and prior to the Testator's decease, or of such of her children as were born subsequently to the Testator's decease,) take any and what estates in the several properties?

V. Whether the shares of *Martha*, (who was born at the date of the Will,) and of *Thomas*, (who was born in the lifetime of the Testator, but after the date of his Will, both which children were dead without issue,) did, on their deaths without issue, vest in any and which of the grandchildren?

*June* 9—12, 1812.

The Case was argued at Westminster, in Trinity Term 1812, by *Preston* for the Plaintiffs in equity, and *Gifford* for the Defendants.

*For the Plaintiffs.*

[After stating the case, and pointing out the distinctions in the different devises.]

I must first take the devise of that part of the *Littleton* estate which the Testator calls the residue. That devise is "during the life of the son to Trustees for

MOGG v. MOGG.

certain purposes; then to the children of the son, lawfully to be begotten, for life; remainder to the issue of such children and their heirs as tenants in common without survivorship; and, in default of such issue, then to the children, begotten and to be begotten, of his daughter, *Sarah Mogg*, during their lives; and, after the decease of such children, to the issue of such children, and their heirs, as tenants in common, without survivorship; and, in default of such issue, then over." The son never had a child. A gift to an unborn child for life is good if it stops there (*a*); but, if a remainder is added to his children or issue as purchasers, it is not good (*b*), unless there be a limitation of the time within which it is to take effect (*c*). Therefore the issue of the son's children could not take as purchasers. But, as the words of this devise are the same as those in the limitations to Mrs. *Mogg's* children, I proceed to that part of the Will. In construing a Will, the particular intent is to be sacrificed to the general intent (*d*), if necessary. Now Mrs. *Mogg*'s grandchildren (as the grandchildren of the son) being unborn issue, could not take as purchasers; but they may take by transmission through their parents. This leads to the question whether the issue of the children, (upon the construction of the

(*a*) *Evans* v. *Astley*, 2 Black. 523, per *Wilmot*, J. *Routledge* v. *Dorrell*, 2 Ves. jun. 357, per Lord *Alvanley*.

(*b*) *Hay* v. Earl of *Coventry*, 3 Term Rep. 86. D. of *Marlborough*'s case, 5 Bro. P. C. 608. Vide 1 East 452, 453.

(*c*) *Hockley* v. *Maubey*, 1 Vesey jun. 150, and see *Routledge* v. *Dorrell*, *ubi supra* (as to personalty.)

(*d*) *Robinson* v. *Robinson*, 1 Burr. 38, and many subsequent cases. See *Butl.* Ed. of Fearn's Cont. Rem. p. 203, n.

devise to them,) were intended to take estates tail, or estates in fee. If the issue were to take estates tail, (which I contend for,) then it is well settled, that to effectuate that intention, the parents shall take in tail (a). I contend also for cross remainders; and it is very material for me to establish that, because it leads to establish estates tail, the argument being that the Testator intended to exhaust one family before he took in the other. This construction will be said to be opposed by the words "without survivorship;" but those words go only to prevent the consequence of a joint tenancy, and do not make against the implication of cross remainders.

It will be argued, then, on the other side, that the issue of the children were intended to take in fee; and, therefore, that their parents will take only for life. But many similar cases have occurred; and they are uniform in giving an estate tail to the parent, at least, where the words "without survivorship" have not occurred. This clearly was intended as a gift to the children and their family. The measure of an estate tail, is to a man and the heirs of his body; and, therefore, a gift to the family is satisfied by such a gift. For this construction I rely on *King* v. *Burchell* (b), *Frank* v. *Stovin* (c), *Roe d. Dodson* v. *Grew* (d), *Doe* v. *Applin* (e), *Denn* v. *Puckey* (f), *Doe* v. *Cooper* (g), and *Pitt* v. *Jackson* (h), in all of which devises to

(a) *Frank* v. *Stovin*, 3 East 548, and other cases cited below.

(b) Ambler 378, and note, 4 Term Rep. 296.

(c) 3 East 548.

(d) 3 Wils. 322.

(e) 4 Term Rep. 82.

(f) 5 Term Rep. 299.

(g) 1 East 229.

(h) 2 Bro. C. C. 51.

Mogg v. Mogg.

persons for life, and after their deaths, to their issue or children, followed in some by words of limitation to the heirs male of the body, or the heirs general of such issue or children, have been held to confer estates tail. *Pitt* v. *Jackson* was a very strong case. The reason of the construction in all these cases, establishing the doctrine which has been called the doctrine of *Cy Pres*, is that the grandchildren or issue may derive some benefit under the devise though not precisely that intended. It is true, the effect is in some measure to disappoint the Will, as it gives all the estate to one person, and enables him to bar the rest by recovery; yet the Courts have not regarded that. The cases most nearly resembling the present are *King* v. *Burchell* (a), and *Frank* v. *Stovin* (b), the latter of which was brought before this Court to try the former, and confirmed it.

As to the cross remainders, I rely on the cases of *Watson* v. *Foxon* (c), *Doe* v. *Webb* (d), and *Green* v. *Stephens* (e). These cases establish the general principle that, where the estate is to go over all at once, cross remainders are to be implied (*f*).

In considering the limitations to Mrs. *Mogg*'s children, I have argued the effect of the gifts to the son's children. What I contend for is, the gift of the residue of the *Littleton* estate to the Trustees for the life of the son, with remainder to the children of the

(a) Ambler 378.
(b) 3 East 548.
(c) 2 East 36.
(d) 1 Taunt. 234.
(e) 17 Ves. jun. 64.
(*f*) *Green* v. *Stephens* goes a little further than the preceding cases, establishing that, where the devise is to an unascertained number of objects, cross remainders are to be implied.

son as tenants in common in tail with cross remainders: Remainder to the children of Mrs. *Mogg* as tenants in common in tail with cross remainders. The number of the children "begotten or to be begotten," makes no difference, because the estate may open to let in after born children, even after a vesting of the estate.

As to the other part of the *Littleton* estate, it is given to the Testator's widow for her life; and, after her decease, to the same uses as before declared concerning the residue of that property. The construction, therefore, must be the same as if the devises already stated and commented on had been here repeated.

The next branch of the case is upon the devise of the *Upper Mark* estate; and this is open to exactly the same observation as the former, the only difference being that here there is no life estate before the devise to Mrs. *Mogg*'s children. So that, even if the limitation to her children in the first branch of the case should be held to be void as too remote, yet the gift of them here is good.

But, (adverting again to the devise of the *Littleton* estate, with reference to this distinction), even if the limitations to Mrs. *Mogg*'s children should be void as remainders for remoteness, yet they may be good as alternative limitations, the son never having had any child. The same limitation may turn out good, in one event, which would be bad in another. On this subject the cases are collected by *Fearne* in his Contingent Remainders (*a*). But it is hardly necessary to argue this point, as it is now settled that an estate which

(*a*) 514, Butler's Edit.

MOGG v. MOGG.

must determine on a general failure of issue must, to be legal at all, be an estate tail.

The next branch is as to the *Lower Mark* estate. Here the gift is to the Trustees and their heirs, to apply the rents and profits to the maintenance of the child and children of *Sarah Mogg*, for his, her, and their life and lives, and after the decease of such child or children, a *devise* to the lawful issue of such child and children, in the same words as in the former clauses. I contend, first, that this is a devise to the Trustees during the lives of the children, and the life of the survivor. There is nothing to sever the tenancy between the children, or give any remainder over earlier than the death of all. But secondly, the next part of the construction of this devise is new, and very difficult. The first gift is to the Trustees during the lives of the children; the second is to the grandchildren themselves. It has become a general rule, that equitable and legal interests cannot unite so as to be brought within the rule in *Shelly*'s case. This is so settled, that I cannot oppose it: and *Fearne* has involved the cases on that rule with cases of construction merely, which, perhaps, is not correct; for the rule in *Shelly*'s case was a rule of tenure, not of construction (a); and, indeed, it most commonly defeats the intention. Cases, therefore, upon that rule, must be materially different from those which depend on the question of intention. But what is there to prevent the Court from saying here, that they will give effect to the intention? It may be held that the gift to the issue, who could not take as purchasers, operated as an implied gift to the parents; in order that the issue might take by

(a) Per Lord *Mansfield*, *Evans* v. *Astley*, 1 Black. 523.

transmission: as if it had been a devise to the Trustees during the lives of the children, and the survivor of them, with remainder to the children themselves as tenants in common in tail. The reverse of this has often been done, where there has been no gift to the issue: but the descendants appeared to be included in the scope of the gift; as, where the gift has been to *A.*, and if he should die without issue, over (*a*). Here, I contend, the same intention is to be found as in all the former parts of the Will; and the question is a question of intention and construction only.

The next branch is as to the copyholds and leaseholds, and it is a double gift, (the exception of those in *Timsbury* operating as one distinct gift). As to the excepted copyholds and leaseholds, the Testator directs them to be annexed to his freeholds in *High Littleton*, for and upon the same uses as are declared concerning the residue of that property; therefore, whatever is the construction of the gift of the *High Littleton* estate, it will govern the construction of this gift. This requires me again to advert to what I have said on the devise of the *High Littleton* estate. As to the leaseholds, this must operate as a gift with a double aspect; *viz.* to the son's children, if he had any; but, if he had none, (which happened,) then to Mrs. *Mogg*'s children. The devises, therefore, to Mrs. *Mogg*'s children were good in the event, which happened (*b*).

(*a*) *Wylde* v. *Lewis*, 1 Atk. 432. *Evans* v. *Astley*, 1 Bl. 523. But, in order to admit of that construction, as to *real* estate it seems the first devise must be *indefinite*; but as to *personal* estate, the construction may be adopted, where the first devise is expressly for life.

(*b*) Butl. Fearn 514, &c.

MOGG v. MOGG.

The next branch is as to the other copyholds and leaseholds. The copyholds are either in fee, or for lives. Copyholds or leaseholds for lives may now be entailed; and as the entail in them cannot lead to a perpetuity, the question as to the gifts over being too remote cannot arise. Here, too, the argument will be the same as before; as *John Hodges* never had any issue, the gift to Mrs. *Mogg*'s children was capable of taking effect. But the devise being, "I give and bequeath my copyholds and leaseholds so that (*a*) the issues and profits may belong to the children of *Sarah Mogg*, begotten and to be begotten," for life; this involves the question as to the number of children to take. There is this difficulty here as to the children born after the death of the Testator. I must contend it is a gift of the leaseholds to the children themselves, on account of the gift to their issue. A gift of personalty to *A.* and his issue, is a gift to *A.* But then the bequest to the issue of an unborn child is void; and, therefore, must be considered as no devise at all. However, a gift of personalty to *A.* for life, and if he dies without issue, then over, has been held to be a gift of the whole interest to *A.* (See *Butler*'s *Fearne* (*b*) ). So a gift to *A.* for life expressly, remainder to the heirs of his body, vests the whole term in him. *Butterfield* v. *Butterfield* (*c*). And a late case argued by me in Chancery (*d*); gift to *A.* during his

(*a*) Vide ante, page 662; that this was not, in fact, the language of the Will, though so stated in the case.

(*b*) 486, &c.

(*c*) 1 Ves. 133, 157, and see *Watson* v. *Boden*, Amb. 398, 478.

(*d*) *Elton* v. *Eason*, ROLLS, *April* 27, 1811, *Sarah Marwood*, by her Will, gave several annuities to her daughters for their lives; and gave all her messuages, lands, &c.

life, and if no heirs of his body, then over. This was held to vest the whole interest in the leaseholds in him, because otherwise his family could not have the benefit of the whole; and this was done, though he might defeat his issue, and though they could not take as purchasers. Here the issue cannot take as purchasers: therefore, in order to effect the general plan and intention of the Will, the children must take absolute interests in these leaseholds.

The next branch is, as to the coal-mines under the

and all her monies and personal estate to Trustees, their executors, administrators, and assigns, in trust for payment of her debts, annuities and legacies, and to keep her leaseholds and copyholds for lives *full stated*, and in trust to apply the residue of the rents, (after certain purposes,) for her son *J. T. B. Marwood*, (who appears to have been of infirm mind,) during his life, *and afterwards for the heirs of his body, if any, and in default of such issue, to Testatrix's grandson*. The Bill was filed by the grandson to establish the limitation in the Will. The case was argued by Sir *S. Romilly*, *Hart*, *Roupell*, and *Preston*, for the Plaintiff, and *Richards* and *Wingfield*, for Defendants. It was admitted on all hands that the Will created an estate tail in the freeholds and copyholds of inheritance; but it was contended that the limitation over was not good as to the personalty. The cases of *Forth* v. *Chapman*, 1 P. Wm. 663. *Doe* v. *Pegden*, 2 T. R. 620. *Knight* v. *Ellis*, 2 Bro. C. C. 570. *Clare* v. *Clare*, Cas. Temp. Talb. 21. *Goodright* v. *Dunham*, Dougl. 267. *Richards* v. *Abergavenny*, 2 Vern. 324, were cited. His Honor decided that the son took the absolute interest in the chattels; referring to *Crook* v. *De Vandes*, 9 Ves. 197, and *Southby* v. *Stonehouse*, 2 Ves. sen. 610. See also *Donn* v. *Penny*, ante, p. 20. *Brouncker* v. *Bagot*, ante, p. 271.

freehold estates. It is a devise of the fee, because it is an exception out of a devise in fee; whatever construction be adopted as to the freehold *Upper Mark* estate, the same must be adopted as to these coal-mines.

The next branch is, as to the coal-mines under the other estates; and, here, the construction, as to such parts as are of inheritance, will be the same as the construction of the preceding gift of the copyholds; and as to so much as is leasehold, the construction will follow that of the Testator's leaseholds.

The coal-mines in work, (or working shares, as the Will calls them,) will follow the same distinctions.

The residuary bequest is only important, so far as the Court may think that any part of the leaseholds is not disposed of; as if the children take for life, and their issue take nothing. The difficulty here will be, whether it applies to the unborn children, as it does not contain the words "to be begotten." I contend, it extends to the after born children, by reason of the intention, apparent throughout the Will, to place the after born children in the same situation as those who were born.

*For the Defendant.*

The construction contended for by the Plaintiff's counsel cannot be adopted, unless the Court can make, and not merely construe a Will. The intention is to be collected from the words, and must be consistent with the rules of law. If the intent cannot prevail, it must fall to the ground. The Court cannot substitute other limitations in place of those which are contrary

to law. This is a general rule and principle. *Chapman* v. *Brown* (a). I admit the rule, that the particular intent is to give way to the general intent; but this is subject to another principle, that the limitations must be consistent with the rules of law. The estates are expressly given to the children for life. The next object was that their children should take the fee of the freeholds, and the absolute interest of the personalty. The personalty is given to them, their executors, administrators, &c. the freeholds to them and their heirs, which leaves no doubt of this intention. But then it is argued that, because the limitations to the children of the unborn children cannot otherwise take effect, the doctrine of *Cy pres* is to be applied. Most of the cases on that doctrine arose upon powers. In all of them estates tail were intended for the issue; and there is no one of them in which a fee was intended for the issue. In *Brudenell* v. *Elwes* (b), it has been laid down that this doctrine is not to be carried farther. In *Pitt* and *Jackson* (c), the limitation to the unborn issue was of an estate tail. For this reason, the counsel for the Plaintiffs has laboured to prove that the gift to the issue in this case was in tail only, and that the words "heirs and assigns" were to be cut down to "heirs of the body." And for this purpose he insisted on the words "in default of such issue;" but those words mean, "in case there shall be no such issue;" for which I shall presently cite authorities.

*King* v. *Burchell* is said by *Fearne* to be a strong case; and the proviso was a main ingredient. In that case, the issue were intended to take in succession.

(a) 3 Bro. P. C. 273. 1 East 351.

(b) 7 Ves. jun. 290, and (c) 2 Bro. C. C. 51.

MOGG v. MOGG.

Here they are to take altogether as tenants in common without survivorship (*a*).

The Testator declares there shall be no survivorship. Yet the Plaintiffs contend for cross remainders.

As to the personalty, the children of the children cannot, upon their own construction, take any thing.

They are further embarrassed as to the *Lower Mark* estate, by the gift to the Trustees during the lives of the children. As to that devise there is no case to give *B.* an estate tail, merely because there is a gift over in default of his issue, without any preceding gift to *B.* himself; and here no estate is given to the children, of which this Court can take notice. It is sufficient to say that, in all cases, where the words "in default of issue" have been held to give estates tail, the parent of such issue has taken some preceding estate expressed or implied (*b*).

I will now state my construction.

1. As to the *Littleton house*, and the property devised with it; the widow takes for life; and it is not material whether she takes a legal or an equitable estate.

2. As to the rest of the *Littleton estate*, the Trustees

(*a*) The proviso in that case does, in fact, seem greatly to diminish its authority; as the intended restriction on the devisees from disposing of the estate implied an intention to give them at least estates tail. Perhaps this has not been sufficiently adverted to by the writers who have discussed that case.

(*b*) 1 Bl. 505; *Gardner v Sheldon*, Vaugh. 259.

take during the life of the son: and the first part is given in the same way after the widow's death. Next there is a clear contingent remainder to the son's children, followed by the limitations in question to the children of his daughter, *Sarah Mogg*. The intention was, that the children of the son and of the daughter should take life estates with remainder in fee to their children, or an alternate fee to others, according to *Loddington* v. *Kime* (a), *Doe* v. *Holmes* (b), *Goodright* v. *Dunham* (c), *Doe* v. *Perryn* (d), (all cited in Butl. Fearn 373,) *Seward* v. *Willock* (e), *Rex* v. Marquis of *Stafford* (f), *Doe* v. *Lyne* (g).



These cases shew that the children would take for life, with remainder to their children in fee, if they should have any; if none, then to other persons in fee.

The words are, "in default of *such* issue;" and as to the force of the word *such* in this place, I refer to the cases of *Hay* v. Earl of *Coventry* (h), and *Doe* v. *Perryn* (i). In the former case, the Court leant to give the daughters an estate if it could have done so: but, as it could not be done without rejecting the word "such," the construction failed. The word "heirs" may certainly be restrained in some cases to mean "heirs of the body," as where the devise over is to one who would be collateral heir to the first taker. There is, in this respect, a difference between "heirs" and issue;" and here the word used is "issue."

(a) 3 Lev. 431. 1 Lord Raym. 224, S. C. 1 Salk. 203, S. C.

(b) 3 Wils. 237.

(c) 2 Black. 777. Dougl. 264, S. C.

(d) 3 Term Rep. 484.

(e) 5 East 198.

(f) 7 Ib. 521.

(g) 1 Term Rep. 293

(h) 3 Ib. 86.

(i) 3 Ib. 484.

"Issue" is a word either of purchase or of limitation, and may be construed either way according to the intention. In the present Will, the Testator uses the words "in default of *such issue*" as to the personalty, as well as the real estate. And, with reference to the former, it is clear it can only refer to children of the children. Upon these grounds I contend, that the words "in default of such issue" can not be held to cut down the estate limited to the grandchildren of the son to any thing less than a fee-simple.

Now, if the gift to the son's family was a gift to the children for life, remainder to their children in fee, this last limitation, being to the children of unborn children, was too remote, and therefore void. And then all the limitations after it were also void, *Proctor* v. Bishop of *Bath* and *Wells* (a), *Robinson* v. *Hardcastle* (b), *Cambridge* v. *Rous* (c).

But admitting that the subsequent limitations may take effect, yet how can all the nine children of *Sarah Mogg* take under such of the devises to them as may operate as remainders? Some of them were not *in esse* when the particular estates determined (d). Four of the children were born after the son's death; and, therefore, cannot take any shares in the residue of the *Littleton* property, which is a *remainder* expectant, at least, on his death. All were born before the widow's death, and might take under the remainder in her part of the estate. But I contend, they only take life estates; and the limitation to their children is too remote, at

(a) 2 Hen. Black. 358.

(b) 2 Term Rep. 253, according to the opinion of two Judges.

(c) 8 Ves. jun. 12.

(d) *Reeve* v. *Long*, 1 Salk. 277.

least, as to all the children born after the death of the Testator.

Mogg v. Mogg.

As to the *Upper Mark* estate.—Notwithstanding the words "to be begotten," this devise can only apply to the children who were born before the Testator's death. Those words are satisfied by letting in the children born after the date of the Will, before the death of the Testator. *Bateman* v. *Roach* (*a*): There is no question of remoteness here; but it is an immediate devise, to take effect on the Testator's death. It must, therefore, vest in those children who were then *in esse*. "Devise *per verba de præsenti;* persons not capable at the time cannot take." *Fearn* 532: "Devise to children, confined to those born at the death of Testator, at most." Shep. Touchst. 436. There are many cases to this effect on personalty, in Chancery; viz. *Northey* v. *Strange* (*b*), *Heath* v. *Heath* (*c*), *Isaac* v. *Isaac* (*d*), *Roberts* v. *Higmose* (*e*), *Singleton* v. *Singleton* (*f*), *Ayton* v. *Ayton* (*g*), *Ellison* v. *Airey* (*h*); in all of which, devises or bequests to the children of a given party have been confined to children living at the time the gift became vested in possession. *Baldwin* v. *Karver* (*i*) is another, and very material authority. There, all the twenty-one grandchildren were held to take, *because they were all in esse at the death of the tenant for life;* from which it is to be inferred that, if they had not all been then alive, all could not have taken, which is a very important authority as to the *residue* of the *Littleton estate*.

(*a*) 9 Mod. 104.
(*b*) 1 P. Wm. 341.
(*c*) 2 Atk. 121.
(*d*) Amb. 348.
(*e*) 4 Bro. C. C. in not.
(*f*) 4 Bro. C. C. 541.
(*g*) Ib. 541.
(*h*) 1 Ves. 111.
(*i*) Cowp. 309.

Mogg v. Mogg.

There is no case that an estate once vested in possession can be afterwards devested and opened to let in an after born child, where the vesting is by purchase; though it is otherwise in cases of descent; as on the birth of a posthumous son after the descent to a daughter, or the birth of a second daughter after a descent to the eldest. Co. Litt. 9. a. Bro. Abr. *Done et Remainder*, pl. 21. Year Book, Hen. VII. fo. 27. pl. 11. *Reeve* v. *Long*, 1 Salk. 227. So long, indeed, as the estate remains an estate *in futuro*, it may open, even where it vested by purchase. *Doe* v. *Martin* (a), *Doe* v. *Perryn* (b). But not after it has taken effect, or become vested in possession. Upon these authorities, I contend clearly that only the four children born at the Testator's death could take under the devise of the *Upper Mark* estate; and that only those who came in *esse* before the death of *John Hodges* could take under the devise of the residue of the *Littleton* estate. The death of the Testator in the one case, and the death of *John Hodges*, the tenant for life, in the other, were the times at which those devises respectively vested in possession; after which there could, as I have shewn, be no opening or devesting of the estate. But if the after born children could be let in, still they could only take estates for life; and then, the remainder to their issue being void for remoteness, their shares must go on their deaths to the heirs at law, or (as I contend,) to the issue of the other children *per capita*. In that view, the gift to the issue of the children is an independent gift by way of remainder to a class of persons; and it is well settled that a remainder so limited will vest in those who are capable at the time it falls into possession (c). I con-

(a) 4 Term Rep. 39.

(b) 3 Term Rep. 484.

(c) Co. Litt. 9, a. Sheph. Touchst. 436. *Baldwin* v. *Karver*, Cowp. 309.

tend, therefore, that this remainder to the issue of the children of Mrs. *Mogg* must fall into possession on the death, at farthest, of the last surviving child, and that it must then vest in the issue of the four children born in the lifetime of the Testator, or such of them as may have issue, as a remainder in fee, and that they will take *per capita;* according to the case of *Stephens* v. *Hyde* (*a*).

3. As to the *Lower Mark* estate.—The devise is to the Trustees only during the lives of the children, and at most the life of the survivor. *Silvester* v. *Wilson* (*b*), *Shapland* v. *Smith* (*c*), *Doe* v. *Simpson* (*d*), and many other cases, shew that the Trustees, under a devise like the present, take only such estate as is commensurate with the trust.

It is not material to the present argument whether they take during the life of the surviving child or not: because, in either way, the children take only equitable estates, which cannot unite with the legal remainder to their issue, the construction of which I have already argued in the last branch of the case. To get rid of this difficulty, the Plaintiff's counsel wishes the Court to interpose a remainder to the children, which might be enlarged into an estate tail by force of the subsequent words. There is no authority for that; for implication cannot be admitted, except where there is a chasm to fill up, and there is none in this instance.

As to the copyholds in fee and for lives, and the leaseholds for lives, and the mines under the free-

(*a*) Cas. Temp. Talb. 27.
(*b*) 2 Term Rep. 444.
(*c*) 1 Bro. C. C. 75.
(*d*) 5 East 162.

MOGG v. MOGG.

holds, the construction must be the same as with respect to the freeholds.

As to the chattels: there is no doubt the intent was to give to the children for life only, and then to their children absolutely. It is settled that the doctrine of *Cy pres* is not to be applied to personalty. *Routledge* v. *Dorrell*(a), *Somerville* v. *Lethbridge* (b). It is impossible, therefore, to enlarge the gift to the children on account of the gift to their issue; and the principle is a very sound one; because, giving the absolute interest to the parent in a chattel is not doing any thing for the issue, although giving them estates tail in a freehold property is giving them an estate under which the issue may take. Then how can the children take more than is expressly given to them? The whole interest is expressly given away; and, therefore, there is no ground for any implication, which, as I have already said, is only admitted to fill up a chasm. Therefore, the cases of *Watson* v. *Boden* (c), and *Pitt* v. *Jackson* (d), do not apply. The cases in equity clearly apply to this part of the case; and upon their authority it must be decided that only the four children, who were living at the Testator's death, could take the leaseholds and chattels (e).

There being no lapse, it is unnecessary to consider the residuary clause. The general view of the case I contend for is this:—The intention is to be effected, but must be collected from the words of the will. If they are plain, the rules of law must apply, and void

(a) 2 Ves. jun. 357.
(b) 6 Term Rep. 213.
(c) Amb. 398. 478.
(d) 2 Bro. C. C. 51.
(e) *Ellison* v. *Airey*, *Heath* v. *Heath*, &c. cited before.

limitations must fail. The Testator has used technical words, and shewn he understood them; as, using *heirs* for *real* estate, executors for personalty. The rule for sacrificing the *particular* to the *general* intent, is not to be extended further than the cases have already gone; and no case comes up to the present. The Plaintiff's construction cannot prevail without raising cross remainders; and that is not only going beyond the cases, but directly in opposition to the words "without survivorship." The *Cy pres* cases cannot apply without holding that the Testator intended an estate tail for the issue of the children; and that construction cannot be adopted, without rejecting the word "such" in the clause "for default of *such* issue," that word clearly proving that the Testator did not intend a general and indefinite failure of issue, but only of such issue as before mentioned, *viz.* the immediate issue of his grandchildren. At any rate, it is clear, the construction contended for by the Plaintiff's counsel cannot apply to all the devises. 1. Not to the first, because there the devise is a remainder which must go to those who were *in esse* at the time it fell into possession. 2. Not as to the *Lower Mark* estate, because there it is the gift of an equitable estate for life with a legal remainder. 3. Not to the leaseholds and chattels, because it would defeat the intention.

*Reply.*

I shall divide the subject into four heads:—

1. The general rules of law applicable to the case;

2. The general intention and plan of the Will;

3. The decided cases;

MOGG v. MOGG.

4. The consequences and result, as applied to this case.

As to the rules of law which are applicable we do not differ, but as to the application of them.

With respect to the general intention, it is impossible not to see that the Testator's plan was to provide for his children, and all their issue. The words with reference to the children of his son and his daughter are the same; and the words "children to be begotten" must be sacrificed, (at least in part,) if only the four children born in his lifetime are to take.

*Oates* v. *Jackson* (a) is an additional authority to shew that the after born children may take by law. The passages quoted by the Defendant's counsel from *Co. Litt.* and from *Brooke* and the Year Book, relate to estates created by *Livery;* and, in a conveyance operating in that way, it is well known that no one could take who was not *in esse* at the time of the livery. But this is one of the remarkable points of distinction between conveyances at common law, and conveyances operating by way of use, and Wills. Those authorities, therefore, are not applicable to our case; which is like the common case of a devise to children in tail, and a recovery by one before another comes *in esse.* There he acquires the whole fee by the recovery, but the estate afterwards opens to let in any other child who may be born.

The general intention is to provide for all the *family.* The devises are clearly expressed to that effect. There are the *children* and the *issue* of the children men-

(a) 2 Stran. 1172.

tioned; and it is clear the Testator used the latter word as descriptive of the descendants of the former: and the word "heirs," which he has added, serves only to give the devise the character of an inheritance. These expressions together cannot be satisfied otherwise than by giving the children estates tail. Then, as to implying cross remainders, I contend that the words "without survivorship," are no more than synonymous with "not as joint tenants." They would not exclude cross remainders. So far from it, survivorship, which is a quality of joint tenancy, is not compatible with cross remainders, which are a quality of tenancy in common. But it is not necessary to enter further into this question; for I do not rely on the clause of gift for creating cross remainders; but on the gift over being of all the estate, and on the general plan of the Will. On this subject I can only repeat the authorities urged in my former argument.

It has been endeavoured to dispose of this case by distinguishing it from those upon the *Cy pres* doctrine. But it does not turn upon that doctrine alone; for, independent of that, the case may be decided on those authorities which profess to establish the general intention of the Testator. I contend, these authorities are clearly sufficient to entitle all the children to take. The Defendant's argument admits this, as far as life estates in the *Upper Mark* estate; but it is impossible to make any distinction between the general intention, as expressed in that clause, and as it is shewn in the other devises. If I am right in contending that such is the intention, the case of *Oates* v. *Jackson* is a sufficient authority that it may prevail consistently with rules of law.

MOGG v. MOGG.

*Bayley*, J.—That was the case of a *remainder* before it vested in possession;—have you any case of opening an estate in possession to let in after born children?

*Reply*.—In *Mutton*'s case (*a*), where there was a limitation of an use to an unmarried man, and such wife as he should marry, it was held that the estate should open and let her in (*b*). He then repeated the cases in favour of an estate tail, and observed on those cited on the other side against that construction.

On *Goodtitle* v. *Dunham* being cited,

*Bayley*, J. observed, there, the ultimate limitation was to the collateral heir, and yet the preceding limitation was held not to be an estate tail.

*Reply*.—That circumstance is only material, as it is an evidence of intention. So a devise to a denizen, or a bastard, and his heirs, and if he die without heirs, over, is clearly an estate tail; because it can only mean such heirs as he may have, *viz*. heirs of his body. Here, all the persons to take estates in remainder are per-

(*a*) Dyer 274, b. pl. 42.

(*b*) See also *Brent*'s case, Dyer 340, a. which was a limitation in use to *D*., the wife of the Feoffor for life; and if the Feoffor should survive her, then to the use of him, and of such person as he should afterwards marry; and the Court were divided in opinion, whether the second wife could take. There, it will be observed, the remainder fell into possession before the second wife was ascertained. Consequently, it was very similar to the principal case as to the *Littleton estate*.

sons in the line of succession, which must cut down the gifts to estates tail.

*Bayley*, J.—Upon your construction, could the son of a son, who died before the Testator, have taken?

*Reply.*—Certainly not; but that is the consequence of a rule of law, and argues nothing as to the intention. The principle of my construction is to bring every body within the scope and operation of the Will, and to keep the estate in the line intended.

The cases in Chancery of *Ellison* v. *Airey* (a), *Heath* v. *Heath* (b), and others quoted by the Defendant's counsel, proceed on an equitable ground applicable to legacies of money only, and which applies equally where legacies are to be divided between children at twenty-one, and the eldest attains twenty-one, and others are born afterwards (c). If it were otherwise, the legacies could never be paid. But here it is impossible not to let in the after born children without doing violence to the Will by striking out the words "to be begotten."

If the word "issue" is to be held a word of purchase, then the moment a child of the son was born, there was to be an end of the gifts to Mrs. *Mogg*'s family; and Mrs. *Mogg* and her sister might have taken as heirs to such child, to the disappointment of the Testator's arrangement. So, if the son had two sons by different wives, one must have been excluded.

(a) 1 Ves. 111.

(b) 2 Atk. 121.

(c) *Whitbread* v. Ld. St. *John*, 10 Ves. 152; and see 11 Ves. 238; 15 Ves. 122.

MOGG v. MOGG.

As to the argument that the estate tail would defeat the intention, because it would leave it in the power of the child to defeat his issue, I answer that the power of barring estates tail is a consequence of law, and has always been disregarded in questions of intention.

Unless the words "without survivorship" exclude cross remainders, there is clearly enough to raise the *Stephens* v. *Stephens* (a). The doctrine of implied cross remainders has been continually advancing.

As to the *Lower Mark* estate, the Trustees take during the lives of the children, and the survivor. There is no instance of cutting down an estate to Trustees by portions. The intention is the same here as in all the other devises. Therefore, if any difference is to be made, it must arise out of rules of law. The objection, in this part of the case, to an estate tail, is that the estates of the children and their issue cannot unite, being of different qualities. That may be very right upon the rule in *Shelly*'s case; but that rule cannot apply to a case of construction turning merely upon the intention. To effectuate the intention, an implication may be made; and unless some estate is implied here, a large portion of the issue cannot take at all, which would defeat the intention. Cases for raising estates by implication are numerous; for instance, *Pybus* v. *Mitford* (b), *Southcote* v. *Stowell* (c), on covenants to stand seised to uses: *Willis* v. *Palmer* (d). The principle is, if I give an estate to a stranger after failure of issue of my eldest son, that is

(a) 17 Ves. jun.
(b) 1 Ventr. 372.
(c) 2 Mod. 207.
(d) 5 Burr. 2615. 2 Black. 687. S. C.

a gift to the eldest son in tail. In *Roe* v. *Somerset* (*a*), an estate for life was implied in leaseholds. So, in *Doe* v. *Hoskins* (*b*), it was held that an estate might arise by implication from mere circumstances, without any gift. *Newton* v. *Banardine* (*c*) is another instance of an estate tail implied without any gift.

As to all the copyholds and leaseholds for lives, the question is conceded to us.

As to the leaseholds for years, the *Cy pres* doctrine certainly cannot strictly apply; but,

1. The leaseholds in *Littleton*, being given by reference only, must follow the devise of the freeholds there.

2. As to the others, the words used are the same, and the maxim "Noscitur a sociis" applies.

The addition of the word "Executors" in the bequest of the leaseholds to the issue, means no more than that it is a gift out and out. It is merely synonymous with "representatives."

---

(*a*) Ib. 2608. 2 Black. 690. S.C.

(*b*) 9 East 306.

(*c*) Moor 127.

Mogg
v.
Mogg.

The Court, having taken time to consider, returned the following certificate:

*Answer to the first, second, and third Queries.*

We have heard counsel upon this case, and have considered it, and are of opinion that all the nine children of *Sarah Mogg* took estates in tail general, as tenants in common, with cross remainders; *first*, In that part of the *High Littleton* estate which was devised to the Testator's widow for life; *secondly*, In the *Upper Mark* Estate; and, *thirdly*, In those copyholds and coal-mines of which the Testator was seized in fee; and that those same persons took the absolute interest in the copyholds and leaseholds the Testator had *for lives* (a) or years, and in the coal-mines he had for years, with the exception only of that copyhold or leasehold which was to be annexed to the residue of the *High Littleton* estate. And, as to such residue of the *High Littleton* estate, and the copyhold or leasehold to be annexed thereto, we are of opinion, that the four children of *Sarah Mogg*, born in the Testator's lifetime, *Jacob Mogg*, who was born before *John Hodges* died, and *Charles Mogg* who was then *en ventre sa mere*, take estates in tail general, with cross remainders in such residue of the *High Littleton* estate, and also in such copyhold (if a fee-simple, and intailable), and that, if such copyhold or leasehold were *for lives* (a) or years, those six persons took the absolute interest therein.

(a) It will be afterwards seen that this turned out to have been a mistake, and the Decree treats the leaseholds for lives as capable of estates in the nature of estates tail and remainders.

*Answer to the fourth Query.*

We are of opinion, that the issue of such of Mrs. *Mogg*'s children as were born prior to the Testator's decease, take an interest in the *Lower Mark* estate as tenants in common in fee-simple, expectant upon the determination of the estate limited therein to *Slade Baker*, and *John Hooper*, as Trustees; but that none of the issue of such of Mrs. *Mogg*'s children as were born after the Testator's death take any interest in the *Lower Mark* estate, and that none of the grandchildren take any interest, except as issue in tail, in any of the other property.

*Answer to the fifth Query.*

We are of opinion that the shares of *Martha Hodges Mogg* and *Thomas Mogg* in all the fee-simple property, except the *Lower Mark* estate, vested, upon their deaths, in tail general, with cross remainders, in such of the children of *Sarah Mogg* respectively as, according to our answer to the first three queries, took estates tail in that property, and in the two daughters of *Richard Mogg* who died before *Martha Hodges* or *Thomas*; and that the shares of the said *Martha Hodges Mogg* and *Thomas Mogg*, in the copyholds, leaseholds, and coal-mines, the Testator had *for lives* (*a*) or years passed to the personal representatives of the said *Martha Hodges Mogg* and *Thomas Mogg*.

In consequence of this certificate, the original Bill was amended, by striking out *Robert Mogg*, as a co-plaintiff, and making him a Defendant; and (several births and deaths having intervened), a Bill of

(*a*) See ante.

Mogg v. Mogg.

Revivor and Supplement was filed, which stated the certificate, and urged that, by the effect of the certificate, the Court of King's Bench was of opinion that, as to such parts of the Testator's estates at *High Littleton* as were devised to the Testator's wife for her life, (consisting of the mansion-house, and certain lands, hereditaments, and premises,) the nine children of *Sarah Mogg* were equally entitled to the same in tail, and that, with respect to the residue of the estates in *High Littleton*, devised during the life of the Testator's son to Trustees upon certain trusts, the same belonged to the five children only of *Sarah Mogg*, (including the Plaintiff, *Jacob Mogg*,) who were born in the lifetime of the Testator's son, *John Hodges*, and the Plaintiff, *Charles Mogg*, who was then *en ventre sa mere*, (but excluding the Defendant, *Robert Mogg*,) in tail general, with cross remainders; and that, with respect to the freehold estate of the Testator not within the parish of *High Littleton* (a), all the nine children of *Sarah Mogg* took equitable estates for life, to each of them one undivided ninth part, with remainder to the issue collectively of the four eldest of such children, which four eldest only were born in the lifetime of the Testator; that the freehold collieries wheresoever situate belonged to the nine children of *Sarah Mogg* equally in tail; that the copyholds of inheritance in *Timsbury* belonged to the six children only of *Sarah Mogg* who were living, or *en ventre sa mere* at the time of the death of *John Hodges*, the Testator's son, in tail; and that the copyholds for life in that parish, and the leaseholds in the same parish, whether for lives or years, belonged to the same six children absolutely,

(a) It will be observed, that this construction results from combining together the answers of the Court of K. B. as to the *Upper* and *Lower Mark* estates.

exclusive of the collieries, whatever tenure they might be of; that all copyholds of inheritance in any other places belonged to the nine children of *Sarah Mogg* equally *in tail* (*a*), and copyholds not of inheritance in the nine children absolutely; and the collieries wheresoever situate, and of what tenure soever, (not being freehold,) belonged to the nine children of *Sarah Mogg* equally and absolutely: that the shares of *Martha Hodges Barter*, and *Thomas Mogg* deceased, became the property of such parties, and for such estates as follows, (that is to say,) with regard to the estates in *High Littleton* devised to the Testator's widow for life, that the same belonged to the six surviving children of *Sarah Mogg* deceased, and to *Sarah Mogg* and *Martha Mogg*, the children of *Richard Mogg*, in seven parts or shares, (the said *Sarah Mogg* and *Martha Mogg* taking one of such seven shares); and, with respect to the estates in *High Littleton*, devised to the Trustees during the life of the said *John Hodges*, to *George Mogg*, *Jacob Mogg*, and *Charles Mogg*, respectively, and to the said *Sarah* and *Martha*, the children of *Richard Mogg* deceased, in four equal parts or shares, (the said *Sarah* and *Martha* taking one of such four shares between them;) and, as to the freehold estate not in the parish of *High Littleton*, that the same belonged to the children of *Richard* and *Geo. Mogg*, respectively, according to their numbers, as purchasers in fee-simple. And, as to the freehold collieries and copyhold estates of inheritance not in *Timsbury*, to the six surviving children of *Sarah Mogg*, and to *Sarah* and *Martha*, the children of *Richard Mogg*, (such last mentioned children taking one-seventh

(*a*) Vide postea as to this, the devise of the copyholds, according to the real Will, being conformable to that of the *Lower Mark* estate.

MOGG
*v.*
MOGG.

part between them); as to the copyhold estates of inheritance in *Timsbury* to *George Mogg*, and the children of *Richard Mogg*, (such children taking one-fourth part); and as to the copyhold estates for lives, to the customary heirs of *Martha Hodges Barter* and *Thomas Mogg*; and the chattel leases to their personal representatives absolutely; and the Bill prayed that the certificate of the Court of King's Bench might be confirmed, and the rights and interests of the declared accordingly.

*Robert Mogg*, by his answer stated, that he was advised that, according to the true construction of the certificate, and of the Will, all the nine children of *Sarah Mogg* took equitable estates tail, with cross remainders in the Testator's freehold estates not in the parish of *High Littleton*; and that the true construction of the certificate was not as in the Supplemental Bill stated, inasmuch as the Court of King's Bench gave no opinion that the said nine children were entitled to equitable estates for their lives only. He submitted that he, together with the other children of *Sarah Mogg*, born after the death of the Testator's son, *John Hodges*, were, by the effect of the certificate, excluded from any share of the estates in *High Littleton*, so devised to Trustees during the life of the Testator's son, *John Hodges*; and that, if such were the construction of, or necessary inference from, the certificate, the same was in that particular erroneous; for, the Defendant was advised, that he would in that case be excluded from any share of the last mentioned portion of the freehold estates of the Testator in *High Littleton*, whereas he submitted that he was entitled to an estate in fee-simple, or fee-tail, in one-ninth part of the same, and also to a share of and in the parts or shares of the same, late belonging to *Martha Hodges Barter* and

*Thomas Mogg* deceased, by the effect of the cross remainders contained by implication in the Will of the Testator, *George Hodges*: and he also submitted such certificate was erroneous, inasmuch as the Court of King's Bench were thereby of opinion that the shares of the several children entitled to such of the Testator's estates as were copyholds and leaseholds for lives did vest in such children for absolute interests; and that the shares late of the said *Martha Hodges Barter* and *Thomas Mogg* deceased, of and in such copyholds and leaseholds for lives, were respectively vested in their personal representatives, whereas he submitted that such copyholds and leaseholds for lives, being by law capable of limitations in the nature of estates tail, and remainders over, the estates and interests of the several children in whom the same became vested by the Will were interests in the nature of estates tail, and that the shares of *Martha Hodges Barter* and *Thomas Mogg* respectively did, on their respective deaths without issue, go, in the manner of a remainder, to the several other children entitled to the original shares thereof, and to *Sarah* and *Martha*, as issue of the body of their late father, *Richard Mogg*, deceased. And he insisted on a right to a share in the last mentioned portion of the freehold estates in *High Littleton*, in opposition to the Plaintiffs and the other parties, who by the effect of the certificate were alone considered as entitled thereto, and also a part of the last mentioned shares in the copyholds and leaseholds for lives, in opposition to the personal representatives of the said *Martha Hodges Barter* and *Thomas Mogg*, respectively. And he submitted that, according to the true construction of the Will, and by the effect of the subsequent assurances in the pleadings mentioned, he was at law, (or at least in equity,) entitled to an estate in fee-simple, or fee-tail, in one-ninth part of all the

MOGG v. MOGG.

freehold estates of the Testator, as well in the parish of *High Littleton*, as in the parishes of *Mark*, *East Brent*, *South Brent*, and other parishes in the county of *Somerset*, without any exception, and in all the freehold collieries, and also to an equal part or share, his surviving brothers and sisters, and with *Sarah* and *Martha*, (the heirs of the body of his brother, *Richard Mogg*, deceased,) in the two-ninth parts or shares of the said freehold estates and collieries which originally vested in the said *Martha Hodges Barter* and *Thomas Mogg*, respectively, and that he was entitled in equity to the like parts or shares in the copyholds and leaseholds for lives, and to an absolute interest in one-ninth part of the leaseholds for years, or estates of the nature of chattel interests: that the legal estate in fee-simple, and absolute interest, in all the Testator's estates freehold, copyhold, and leasehold, passed to, and became vested in the Trustees therein named: and that the divers bequests therein contained in favour of the children of *Sarah Mogg* were wholly of the nature of trusts or equitable interests, and not of the nature of legal estates.

The Cause came on upon the equity reserved, at the Sittings after Trinity Term, 1815.

*Leach* and *Palmer*, for the Defendants, *Henry Hodges Mogg*, and *Dorothy Kingsmill*, and their families.

There are three points to be argued; *first*, that *Henry Hodges Mogg* and *Dorothy Kingsmill*, together with *Robert Mogg*, were entitled to shares in the residue of the *Littleton* estate, as tenants in tail in common with the other children: *secondly*, That they are entitled to estates tail in the estates in *Mark* and other

parishes: and, *thirdly*, That, supposing the interests of all the children in the latter estates to have been only equitable interests for life, yet they all take for their joint lives and the life of the survivor.

1. If it was the *intention* of the Testator that all the children should take, they all will take, whether the limitations are considered as remainders, or as executory devises. Now, that the Testator intended all to take, appears by his using the words, "begotten and to be begotten," which cannot be satisfied otherwise: for, if it be supposed that he meant those children only who were born before his Will, and should be born afterwards *in his lifetime*, then the word begotten would have been sufficient, the Will speaking from the time of his death. If we suppose he meant those born and who should be born *before John Hodges*'s death, that construction cannot prevail, because, where he intended that, he has expressly said so; as in the gift of the rents accumulated during his son's life: and there is no third construction, except that which takes in all the nine children. Again, the Testator declares that both parts of the *High Littleton* estate are to go to the same uses: and yet, according to the certificate, one part went to all the nine children, and the other part to only six of them.

Considering these limitations as executory devises, the effect would be that the estate would vest in such of the children as were living at the Testator's death, and open, from time to time, for the purpose of letting in those subsequently born. This construction has been adopted in many cases. *Cook* v. *Cook* (*a*), *Weld* v. *Bradbury* (*b*), *Shepherd* v. *Ingram* (*c*), *Mills* v.

(*a*) 2 Vern. 545.
(*b*) Ib. 705.
(*c*) Ambl. 448.

MOGG v. MOGG.

*Norris* (a); and it cannot make any difference whether the estate which is to be opened in this manner originally vested by way of executory devise, or in any other manner. In our case, it was originally a vested remainder; and, admitting the rule of law that a vested remainder under a conveyance at common law cannot open, yet that does not apply to a devise, or to a conveyance by way of use. *Fearne*'s Contingent Remainders (*Butl.* Edit.) 312. But, taking the whole of this Will together, the legal estate in this part of the property remained in the Trustees of the Will, at least during the life of the Testator's widow, which would be sufficient (upon every construction) to let in all the nine children. On this point the case resembles *Chapman* v. *Blissett* (b). There the ulterior trusts required that the trust estate should last longer than the life of the son; and the purpose in this case, of securing the annuity of £100 during the widow's life, ought to have the same effect.

2. The objection to the children taking estates tail in the *Mark* property is, that the limitations to the children are *equitable*, and those to their issue *legal*. That objection is founded on a technical rule of law, which, in a case like this, arising upon a Will, must give way to the intention of the Testator. Many cases at law, as *Doe* v. *Applin* (c), *Doe* v. *Smith* (d), and others, proceed upon the rule of effectuating the intention, to which all other rules of construction give way. But this is more particularly the case in a Court of Equity, where, in all cases, an estate of inheritance is given to, or withheld from, the first taker, according as the intention may require. This is proved by all the cases which have occurred on the construction of

(a) 5 Ves. jun. 335.
(b) Cases Temp Talb. 145.
(c) 4 T. R. 82.
(d) 7 T. R. 531.

marriage articles, as well as the cases of *Wright* v. *Pearson* (*a*), and *King* v. *Burchell* (*b*), which arose upon Wills. This exact question does not appear to have arisen in any former case; but the circumstances in *Pitt* v. *Jackson* (*c*) were calculated to raise the question; and there the first taker was held to be entitled to an estate tail.

3. Supposing the children to take only life interests in the *Mark* estate, then we contend that they take for the joint lives of all, and the life of the survivor. Upon this point the certificate is silent. No objection to this construction can arise from the estates vesting at different times. Lord *Coke*, (Co. Litt. 188. a.) says, "In some cases there may be joint tenants, and yet the estate may vest in them at several times;" of which some instances are put. Again, whether an estate is joint or not, is to be gathered from the context, and does not depend upon any particular words. *Blissett* v. *Cranwell* (*d*), *Rigden* v. *Vallier* (*e*), *Barker* v. *Giles* (*f*), *Cock* v. *Burrish* (*g*), *Armstrong* v. *Eldridge* (*h*). Here the intention evidently was to create a joint tenancy; *first*, from the direction to pay the rents for the support and maintenance of the children, shewing that their benefit alone was intended; *secondly*, from the direction to pay during *his, her, and their life and lives*, which is the same thing as saying, during the lives of them and the survivor; *thirdly*, from the bequest to the issue being to take effect *after the decease of such child and children*, shewing (as Lord *Thurlow* said in *Armstrong* v. *Eldridge*,) that nothing was to go to the children while any of the parents were living.

(*a*) Amb. 358.
(*b*) Ib. 378.
(*c*) 3 Bro. C. C. 51.
(*d*) Salk. 227.
(*e*) 2 Ves. 253.
(*f*) 2 P. Wm. 280.
(*g*) 1 Vern. 425.
(*h*) 3 Bro. C. C. 215.

MOGG
v.
MOGG.

*Hodgson* for the Defendant, *Robert Mogg*.

The rule is clearly established, that where the general intention of the Testator can be plainly collected from his Will, that intention shall be carried into effect, unless it is such as to contravene any rule or principle of law. There are, therefore, two objects to be pursued in this case:—

1. To shew that the Testator intended all the children of his daughter, *Sarah Mogg*, to take.

2. To shew that such intention may by law be carried into effect.

1. It is the general plan of the disposition designed by the Will to give all his estates to his son's family first: to pass, when he had exhausted them, to the family of his daughter *Mogg*; and, when he had exhausted them, but not before, to take the family of his daughter *Harding*. This is the general purport to be collected from reading the Will. The particular wording of the devises is to the same effect; for, when he speaks of the children of his son (who was a batchelor,) he uses the words "to be begotten," but when he speaks of Mrs. *Mogg*'s children (some of whom were living), he says, "begotten and to be begotten." But this is still more strongly marked with reference to the period of his son's death, which is the period to which the present question applies; for when he is speaking of an accumulation of rents, which he directs to be divided on his son's death, he uses the expression "children of my daughter, *S. M. who shall be living at the decease of my said son*," from which it is clearly to be inferred that when he did not use those restrictive words, he did not mean them to be implied. When, therefore, he goes on to devise his estates from and

after the decease of his son, to "all and every the child and children, &c. begotten and to be begotten," without restriction, he did not mean to exclude any child whatever, born before that event or not. Again, he gives the residue of his personal estate to the "children of *S. M.*" generally (under which those living at his death would take, as he no doubt intended): but the *Mark* estate he gives to "all and every the child and children, &c. begotten and to be begotten," under which words the Court of B. R. has certified that all the nine children took equally. From all these circumstances we are bound to conclude that by these words the Testator intended, and that the Court has held that he so intended, all the children of his daughter, however numerous, to take. There are doubtless many particular intents apparent on this Will which are inconsistent with the general intent, and with each other; but the law will reject them, and effectuate the general intent. Now, the only construction which will effectuate the general intention is that which gives to all Mrs. *Mogg*'s children an estate tail. They must take an estate tail in order that the remainders over may not be disappointed, though that construction is very strongly opposed by the particular language of the Will; and on the other hand all the children must take, or else the remainders over may take effect before the Testator intended: as, for instance, if the three youngest children of *Sarah Mogg* are to be excluded, supposing the six elder had died without issue, the *Hardings* must have taken, or if they had not taken the estate must have gone over to the remainder men in fee, (who were mere strangers,) to the exclusion of those three younger children or their issue.

2. It is to be inquired whether this intention of the Testator is opposed by any rule of law. And here it may be proper to remark that the rule, if there be any,

must be a rule of policy, and not a mere technical rule, for mere technical rules must give way when they are opposed to the intention. The question whether there is any rule to oppose us, will be best answered by inquiring how all the children, (supposing them all to take,) could take; or in other words by refusing the devise to its technical operation. If there had been no child of Mrs. *Mogg* living at the Testator's death, this remainder would have been a contingent remainder. I do not contend that it could have taken effect originally and entirely as an executory devise; it must have been a contingent remainder, according to the rule laid down in *Purefoy* v. *Rogers* (*a*). Therefore, if before the contingency had become vested the particular estate had been destroyed, or if it had determined by *John Hodges*'s death, and there had been no child of Mrs. *Mogg* then born, or *in ventre sa mere*, the remainder must have failed altogether. We do not, therefore, contravene that rule. But, in point of fact, this remainder never was contingent; for there being children of *Sarah Mogg* living at the death of the Testator, it became vested in them immediately: that rule, therefore, is not in question. The *Mark* estate became vested in *possession*, and this estate (the *Littleton*) became vested in *remainder* immediately on the Testator's decease. But, to let the after born children in at all, they *must* take by way of executory devise, that is, by that particular species of executory devise which has been called an opening of estate, by which the estate first vested becomes devested, as to a portion of the land, by opening to let in the after born person. If, therefore, they are to take by executory devise, the next inquiry is, whether they are within the limitation which have been prescribed to such devises; and the

(*a*) 2 Saund. 388.

answer must be, that they are. Now, if it is shewn that the Testator intended the after born children to take, and there is a mode by which they can take, (namely, executory devise,) and they are within the boundaries prescribed to such devises, it is difficult to understand why they should not take. The certificate of the Court of B. R. in this very case, in the question as to the *Mark* estate, is a full authority that, so far as respects this rule and the intention, all the children ought to take. The difference, then, between the two cases, must consist in the one being a devise in possession, the other a devise in remainder. But how can this make any difference? because estates, which arise by way of executory devise, are altogether independent of the estates which they are to abridge or defeat, and cannot be affected by the nature or qualities of those estates. There is no reason, therefore, why an executory devise should not be limited upon a remainder as well as upon an estate in possession, and even so limited as not to be capable of taking effect until after the remainder has vested in possession: as, for instance, a limitation to *A.* for life remainder to *B.* in fee; but if *B.* survives *A.*, and afterwards dies without issue living at his decease, then to *C.* would be a good executory devise; and yet there the executory devise must take effect in abridgment only of the estate in remainder.—But it is said, that it is a rule of law, that no person can take the benefit of a remainder who is not in existence at the time when the particular estate determines, and that a remainder limited to a class of persons, as in this case, will vest in those only who are living at the time when it vests in possession: and to this alleged rule the case seems to be reduced. Now, I ask what are the authorities for this rule? The case of *Baldwin* v. *Karver* (a) did not go to this

(a) Cowp. 309.

MOGG v. MOGG.

extent, but is the converse of it. Most of the cases in this Court (a) have arisen on *personal* estate, as to which the Court contemplates an actual division of it, and which cases, therefore, stand on the same foundation with another class of cases as to the division of money (b), but do not apply to devises of land: other cases have been merely cases of construction, where the words have been "all the children;" and, consequently, where the Testator having expressed himself ambiguously, the Court has felt itself at liberty to adopt such construction as it might consider most convenient. But there is absolutely no case which has gone the length of saying that a Testator shall not in such a case as this provide for all his grandchildren. The alleged rule seems to be drawn from one of the common law, which required that all persons who were to take under a feoffment or grant, must be in esse at the time of the livery or of the execution of the grant; but that rule will not go far enough, for in its original foundation it was strictly, as I have stated it; and, though afterwards extended with reference to a remainder, yet that extension was only to let in those persons who should be in esse when the remainder became vested in interest, not when it fell into possession. Besides, it was a rule applicable still more strongly to estates in possession than to estates in remainder; and, therefore, the certificate as to the *Upper Mark* estate has decided that it is not applicable in this case. It is a rule, in fact, that has entirely given way before the doctrine of executory devise which admits of the limitation of any species of estates, and of their being taken by any persons whomsoever, and at whatever times they may come in esse, provided only that the

(a) *Ellison* v. *Airey*. *Singleton* v. *Singleton*, *Ayton* v. *Ayton*, *Heath* v. *Heath* &c. *sup. cit.*

(b) Ld. *St. John* v. *Whitbread*, *ubi sup.*

boundaries be not exceeded, *viz.* that the estates be not rendered unalienable longer than for a life or lives in being, and twenty-one years afterwards.

Mogg v. Mogg.

Sir *Samuel Romilly*, *Roupell*, and *Preston*, for the Plaintiffs.

To say the estate is not to go over till Mrs. *Mogg's* family is exhausted, is begging the very question. The argument proceeds in a circle—as, for instance, it is said that "to be begotten" must mean to include the whole of the children, because the Testator intended them all to take, and that he intended them all to take because he uses the words "to be begotten.' These words are satisfied by the certificate as it stands. With reference to the gift in possession, "begotten" means those living at the Testator's death, and "to be begotten" must mean all born afterwards. But with reference to the gift in remainder, "begotten," applies to those living at Testator's death, and "to be begotten" is satisfied by letting in those who were born afterwards, and before *John Hodges's* death.—The judges having come to this conclusion upon the point, and their conclusion being conformable with *Ellison* v. *Airey*, and other cases in this Court, there is not enough to induce the Court to dissent from their opinion.

As to the *High Littleton* property which is devised by way of remainder after *John Hodges's* death, the Defendant's argument is, that the estate vested by way of remainder, but afterwards opened by way of executory devise. It is to be admitted, that where the devise is of an estate in possession, the after born children may take by the learning of executory devise—so if it were the case of a deed, they might take by way of springing use. But where is the authority that an

Mogg v. Mogg.

estate by way of remainder can open after once it has vested in possession? On the contrary, the result of the rule laid down in *Purefoy* v. *Rogers*, is that every case which can take effect by way of remainder, absolutely excludes the learning of executory devise. Consequently, no limitation can be so construed, as that a person who may take under it by way of remainder, either vested or contingent, can, by a subsequent event inconsistent with his taking by way of remainder, take by way of executory devise. Although the converse is not true; for a limitation, which at first is an executory devise, may by a subsequent event become a remainder. Here all the children, if they had been born in *John Hodges*'s life, might have taken by way of remainder; consequently, those who were in fact born after his death cannot take by way of executory devise.

After the above arguments on the main points of the case, *His Honor* stopped the other counsel who were to have maintained the certificate, and declared his opinion to be in conformity with that of the Court of B. R., except as to the leaseholds for lives (*a*): but intimated that he would hear the reply.

On a subsequent day, *Leach*, after what had fallen from the Court, and on a consideration of the state of the arguments, declined replying.

Nothing afterwards fell from the Court: but the following is an abstract of the Decree.

(*a*) See ante

Mogg
v.
Mogg
March 19,
1816 (a).

Declare, That the nine children of *Sarah Mogg* took estates in tail general, as tenants in common with cross remainders in such parts of the estates at *High Littleton* as were devised to the Testator's widow for life, and in the collieries, &c. of which the Testator was seised in fee. That they also became entitled, in equal shares, as tenants in common, to estates in the nature of estates tail, with limitations thereupon in the nature of cross remainders, in all such parts of the copyhold and leasehold estates, (except collieries, &c.) as were holden for one or more life or lives, and not situated in *Timsbury*. That they also became entitled to the like estates and with the like limitations in such of the leasehold collieries, &c. wherever situate, as were holden for one or more life or lives. That they also became entitled absolutely, as tenants in common, in equal shares, to such of the copyhold estates as were held for years, determinable upon lives, and to the leasehold collieries, &c. and other leasehold estates held for years, or for years determinable upon lives, (except such copyholds and leaseholds for years not being collieries, &c. as were situate in *Timsbury*, which were by the Will directed to be annexed to the residue of the estates at *High Littleton.*)

That *Martha Hodges Barter* deceased, *Richard Mogg* deceased, the Defendant *George Mogg*, and *Thomas Mogg* deceased, (the four children of *Sarah Mogg* born in the lifetime of the Testator,) together with the Plaintiff, *Jacob Mogg*, (who was born before the death of *John Hodges* the Testator's son,) and the Plaintiff, *Charles Mogg*, (who was *en ventre sa mere*

(a) Reg. Lib. B. 1815. page 1202.

MOGG v. MOGG.

at the time of the death of the said *John Hodges,*) took estates in tail general, with cross remainders, in such parts as were freehold of inheritance, in the residue of the estates in *High Littleton* not devised to the Testator's wife for life, and in such of the copyhold estates of inheritance as were situate in *Timsbury*. And that the same parties took, as tenants in common, estates in the nature of estates tail, and subject to limitations in the nature of cross remainders, in such of the copyhold estates and leasehold estates holden for one or more life or lives, as formed any part of such residue of the *High Littleton* property, or were situate in *Timsbury*, (except collieries, &c.) and were also entitled to, and took absolutely and equally as tenants in common, such parts of the residue of the *High Littleton* property as were held for years, or for years determinable on lives, and all the copyhold and leasehold estates in *Timsbury* held for years, or for years determinable on lives, other than and except the collieries, &c. That the nine children of *Sarah Mogg* took, as joint tenants, an equitable estate for their lives, and the life of the survivor, of and in all the freehold estates not situate within *High Littleton*, (except collieries, &c.) with remainder in fee-simple to the issue collectively of the four eldest of such children; *viz. Martha Hodges Barter, Richard Mogg, George Mogg,* and *Thomas Mogg,* (being the children born in the lifetime of the Testator,) such issue to take as tenants in common, and not as joint tenants; and that the same parties took the same, or the like interests, and with the same or the like remainders, in the copyhold estates (*a*) of or to which the Testator was seised

(*a*) See the difference between the Will and the case in B. R. before noticed, which accounts for the varia-

or entitled for an estate of inheritance, not situate in *Timsbury*.



That the shares late of *Richard Mogg*, *Thomas Mogg*, and *Martha Hodges Barter*, (the three deceased children of *Sarah Mogg*,) in all the Testator's estates and properties respectively, (exclusive of their shares of the freeholds and copyholds of which they were only tenants for life,) did, on their deaths respectively, descend, go to, or become the property of, such parties as follows, (that is to say,) I. As to the share of *Richard*; and, *first*, with respect to his share of the estates held as freehold of inheritance, to *Sarah* and *Martha*, the daughters and heirs of the body of the said *Richard Mogg*, equally as coparceners in tail; *secondly* with respect to the estates holden by copy of Court Roll, or leases for life or lives wherever situate, it was declared that a certain settlement executed by *Richard Mogg* barred the estate tail or interest in nature of an estate tail then vested in him; and all estates and interests, or limitations in the nature of cross remainders expectant or dependant thereon, and that the said share passed by certain other conveyances in the pleadings mentioned; *thirdly*, with respect to the estates holden by copy of Court Roll, or by leases for years absolute, or for years determinable upon life or lives, it was declared that his said share, having vested in him for an absolute estate, also passed by the settlement

tion between the certificate and decree, as to these copyholds. It is understood that the decree as to the *leaseholds* (which were devised in the same clause with the copyholds,) proceeded on the ground that the whole legal interest in them was vested in the Trustees, both by the words of the Will, and by renewals of the leases.

MOGG v. MOGG.

and subsequent instruments. II. As to the share of *Thomas*; and, *first*, with respect to the estates in *High Littleton* devised to the Testator's wife for life, the same went or remained to the seven children of *Sarah Mogg* surviving at the death of *Thomas*, and to *Sarah* and *Martha*, the children of *Richard Mogg* deceased, (they the surviving children taking each an equal eighth share, and the said *Sarah* and *Martha* taking the remaining eighth, as representing their said late father.) *Secondly*, with respect to freeholds of inheritance being parts of the residue of the estate in *High Littleton*, the same went or remained to *Martha Hodges Barter* deceased, and *George Mogg*, and the Plaintiffs *Jacob* and *Charles Mogg*, and to *Sarah* and *Martha*, the children of *Richard Mogg*, deceased, in equal parts or shares, (that is to say,) *Martha Hodges Barter*, *George*, *Jacob*, and *Charles*, took one-fifth each, and *Sarah* and *Martha*, the remaining fifth between them; *third*, with respect to the freehold collieries, &c. wheresoever situate, to the surviving seven children of *Sarah Mogg*, and *Sarah* and *Martha*, the children of *Richard Mogg* deceased, in equal parts or shares, (that is to say, to each of the said surviving children an equal eighth, and the said *Sarah* and *Martha*, the remaining eighth part between them equally.) *Fourth*, with respect to the copyhold estate of inheritance in *Timsbury*; to *Martha Hodges Barter*, *George Mogg*, the Plaintiffs, *Jacob* and *Charles Mogg*, and the said *Sarah* and *Martha*, the children of *Richard Mogg*, in equal fifth parts, the said *Sarah* and *Martha* taking an equal fifth between them equally. *Fifth*, with respect to the estates held by copies of Court Roll or leases for lives, the share of the said *Thomas Mogg*, (except such part of the original share of *Richard Mogg*, as

*Thomas* acquired under the deeds or instruments in the pleadings mentioned,) did on the death of him the said *Thomas Mogg*, (he having done no act to bar his estate or interest in the nature of an estate tail, and the limitations thereon expectant or depending as aforesaid,) go over, in the nature of a remainder, to such of his surviving brothers and sisters, as at the time of his death were (according to the several declarations of the original rights of the parties before made,) tenants in common with him the said *Thomas Mogg*, of the said premises respectively, and to the said *Sarah* and *Martha*, (the daughters and heirs of the body of *Richard Mogg* deceased,) each surviving brother or sister, (so entitled by way of cross remainder,) and the said *Sarah* and *Martha*, (as representing the said *Richard Mogg*, their father,) taking one equal part or share, and the said *Sarah* and *Martha*, taking their share equally between them; and the part which *Thomas Mogg* so acquired as aforesaid of the share originally of *Richard Mogg* did, on the death of *Thomas*, pass by his Will in the pleadings stated. *Sixthly*, with respect to the estates held by copy of Court Roll or leases for years absolute, or years determinable with lives, the share of the said *Thomas Mogg*, having vested in him for an absolute estate and interest, did, on his death, pass by his Will.

The Court made a similar distributive declaration as to the share of *Martha Hodges Barter*, deceased, (*mutatis mutandis*), and referred it to the Master to inquire and certify what estates freehold, copyhold, and leasehold, and what collieries, mines, and veins of coal, the Testator died seised and possessed of, and to state the tenures respectively, and to distinguish all the different parts of the estates with reference to the

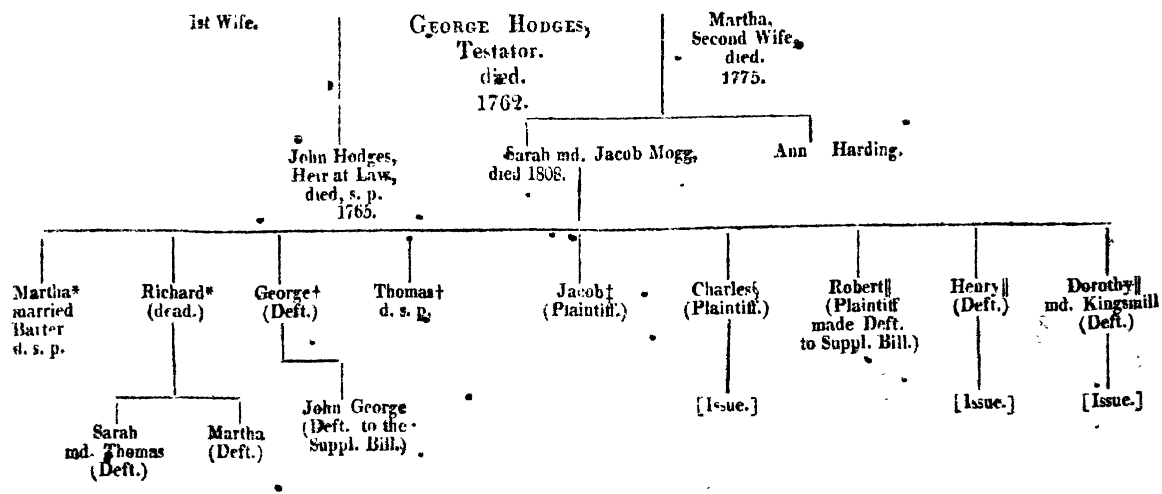
Mogg v. Mogg.

preceding declarations. And also in like manner to inquire and certify in whom the several estates and shares of the said estates were then vested, with reference to the aforesaid declarations, and how, and by what means, and for whose use, the same were then so vested. And all usual directions, &c. (*a*).

(*a*) This note of the case of *Mogg* v. *Mogg* was communicated by Mr. *Hodgson*, of *Lincoln's Inn*. The case has been commented on by Mr. *Preston*, in the 3d Vol. of his work on Conveyancing, p. 555.

# PEDIGREE.

*(Referred to in the preceding Case.)*




* Born before the date of the Will.
† Born after the date of the Will, but in Testator's life time.
‡ Born after the death of Testator, in life time of John Hodges.
§ In *ventre sa mere* at the death of John Hodges.
‖ Born after the death of John Hodges, but in the life time of Testator's Widow.

1816.

ROLLS,
*July* 16, 1816.

UNDERWOOD and Wife, WOODHAM and Wife, and Others, - - PLAINTIFFS.

AND

JOSEPH STEVENS, a bankrupt, LENY SMITH, BELL and PEARKES, (assignees of Stevens,) and KEYMER and Wife, (out of the jurisdiction,) - - - - - - DEFENDANTS.

One of two Executors and Trustees, not having acted otherwise than by joining with his co-Executor and Trustee in the sale of stock, under a representation that the sale was necessary for payment of debts, which it was not; the produce having been received by the latter, and the greater part applied by him to his own private purposes; held chargeable for the amount, except so far as any part was applied to the trust purposes; together with interest at 4 *per cent.;* notwithstanding the parties beneficially interested consented to and approved of the sale, under a similar misrepresentation. See *this case referred to, ante, p.* 582.

JOHN FARRANT, by Will, gave the residue of his estate and effects to *Wilson* (deceased,) and to the Defendants, *Stevens* and *Smith*, in trust to sell, and invest the produce, for the benefit of his three daughters (the female Plaintiffs, *Underwood* and *Woodham*, and Defendant *Keymer*), to be paid to them respectively, as therein mentioned; and appointed his said Trustees, together with his wife, Executors. In the Will was contained a proviso that the Trustees and Executors respectively should be answerable only for such monies as they should respectively receive, and should not be answerable or accountable for the acts, receipts, or defaults of each other, or for any banker or broker, &c. with whom any part of the estate should be deposited, or for any other loss, misfortune, or damage which might happen in the execution of the Will, except the same should happen through their wilful default respectively.

All the Executors proved the Will. *Wilson* died shortly after; and the Testator's widow was also since deceased. *Stevens* got in and received the estate to the amount of £11,000, out of which he made several

payments, leaving a balance due from him to the estate of £3000 and upwards. *Smith* no otherwise acted than by joining with *Stevens* in the transfer of two sums of £1000 and £3,500 stock, which were sold at two several times, and the produce received by *Stevens* alone; the Master (to whom it was referred by the decree to take the accounts and make certain inquiries thereby directed,) reporting that there was a balance in *Stevens*'s hands, at the time of the first sale, of £482, and at the time of the second sale, of £1055: that the sales were not necessary for the purposes of the Testator's Will, and that no part of the produce had been applied in payment of the debts, except £1764 which had been so applied; but for which there was sufficient in *Stevens*'s hands, as Executor, without resorting to the sales in question. In *July* 1806, *Stevens*, (with one *Carttar*, his partner in trade,) became bankrupt, and *Smith* (at the request of *Underwood*) proved, both against the joint estate, and against *Stevens*'s separate estate, in respect of the balance, with liberty to make his election under which of the estates he would receive his dividends.

The Master further found, upon the affidavit of *Smith*, and other evidence before him, that, shortly after the Testator's death, (on the 9th of *January*, 1799,) a meeting took place between *Smith* and *Stevens*, the Testator's widow, and one of his daughters, (since married to *Underwood*,) when *Smith*, upon being applied to to prove the Will, at first declined, but being strongly urged, at last consented to do so upon the positive assurance of the widow and children of the Testator, that he should have no responsibility or trouble in the Testator's affairs, except so far as regarded the liquidation of certain partnership accounts

1816.

UNDERWOOD
*v.*
STEVENS.

with which he was supposed to be particularly conversant. That, in *July* 1802, *Smith* was applied to by *Stevens* and the Plaintiff *Underwood* jointly, to join with *Stevens* and the Testator's widow, (*Wilson* being then dead,) in the sale of the first stock sold, which he agreed to, and did accordingly, on a representation that the sale was necessary in order to enable *Stevens* to make to *Underwood* an advance in respect of the fortune of his wife, (one of the Testator's daughters,) to whom he was then lately married. That in 1804, (after the death of the widow,) *Smith* was again applied to by *Stevens* and the several persons interested, (particularly by *Underwood*, who had before acted as agent for the other daughters and their husbands,) to join with *Stevens* in selling out more stock to enable him to pay the several legatees the legacies to which they had become entitled on the widow's decease, and to invest the balance in order that the whole of the Testator's property might be in one fund; and that he agreed to, and did join in this second sale upon such application, and also under the like representation of the sale being necessary for the intended purpose. That, after he had so concurred in the said respective sales, he often inquired of *Stevens* whether he had paid the legacies and invested the balance accordingly, and was informed by him, that he had done so; and that it was not till after the bankruptcy of *Stevens* and *Carttar*, that he discovered these representations to be false, and that *Stevens* had in fact applied a great part of the produce of the sales to the use of the partnership. That, at a meeting which took place subsequent to the bankruptcy, the Plaintiffs *Underwood* and *Woodham* both admitted the money to have been so applied by their consent, and with the consent of the Defendant *Keymer*, the partners being to allow them interest for

1816.
UNDERWOOD v. STEVENS.

the same, which was paid to them accordingly. It further appeared that none of the parties knew, at the time of the sale, nor until after the bankruptcy, what were the balances actually in the hands of *Stevens* at the respective times of these sales, except from an account rendered by *Stevens*, previous to the first sale, by which it appeared that no more than £17, or thereabouts, was then in his hands, and from the general representations made by *Stevens* of the sale being necessary, &c.

Under these circumstances, the cause coming on for further directions, it was endeavoured, on the part of the Plaintiff, to make the Defendant, *Smith*, answerable for the entire produce of the stocks transferred.

*Hart*, *Wetherell*, and *Wilbraham*, for the Plaintiffs,

Relied on the case of Lord *Shipbrook* v. Lord *Hinchinbrook* (*a*), as a direct authority for charging the Defendant in respect of his negligence, allowing him, upon the same authority, not to be liable to the extent of the £1764 reported to have been applied to the purposes of the Will.

Sir *Samuel Romilly* and *Cooke*, for the Defendant *Smith*,

Contended that the Defendant was discharged by the *Cestuys que trust* having authorized the sales, and referred to *Brice* v. *Stokes* (*b*), where the Lord Chancellor says, "It is clear, upon settled cases, that if there are two Trustees, and a transaction takes place, in which

(*a*) 11 Ves. 252. 16 Ves. 478.

(*b*) 11 Ves. 319. 325.

1816.

UNDERWOOD *v.* STEVENS.

the fund is taken out of a state in which it ought to have remained, and is not placed in the state in which it ought to be, but is kept in hands that ought not to retain it, if any particular *Cestuy que trust* has acted in authorizing that as much as the Trustee who has not the money in his hands, and continues to permit it to be so treated, in a question between that *Cestuy que trust*, and that Trustee, the latter cannot be called upon by the former."

*The* MASTER *of the* ROLLS.

It appears by the Master's Report, that a considerable sum of money has been lost, owing to the Defendant *Smith*'s suffering the stock to get into the possession of his Co-Executor. The Master further reports, that the sales were unnecessary; and it is, therefore, incumbent on Mr. *Smith* to make out a case to protect himself from the consequences of his concurrence. For this purpose, he first relies on the meeting which took place between himself and some members of the family after the Testator's death, and upon what passed at that meeting. But, supposing all the parties interested to have been present, all that can be inferred from what passed on that occasion is, that he should not be required to act beyond the settling some particular accounts. Now, what is imputed to him is, not that he did so act beyond the settling those accounts, but that, when he acted, he acted improperly. As to the first sale, however, even this ground of defence cannot avail; for, according to *Smith*'s own statement, neither of the married women interfered upon that occasion; and what became of the produce of that sale does not appear.

The second sale stands upon quite a different foot-

ing. That appears to have taken place, with the consent of the parties, for the purpose of carrying into effect the trusts of the Will. But, with regard to that also, it is sworn, both by *Underwood* and *Woodham*, and their respective wives, that they knew nothing of the balance which was in *Stevens*'s hands at the time of the sale. If they had, did their consent to the sale in any degree imply that the Executors were to apply this money to their own individual purposes? What was intended was, that they should apply it to the particular purposes of the Will; and this was both reasonable and proper. Therefore, how can it be said that these parties consented to a breach of trust? Then it is alleged that some of the parties knew of the money being suffered to remain in the hands of *Stevens* and *Carttar*, and consented to its being suffered so to remain. But the knowledge or consent of the husbands could not bind the married women.

If, therefore, it rested here, I should have been of opinion that *Smith* was responsible for the whole. But the Master finds that £1764, part of this stock, was afterwards applied to pay the shares of the legatees; and thus there is room for the operation of the lenient doctrine of the Lord Chancellor in Lord *Shipbrook* v. Lord *Hinchinbrook*.

To that extent, therefore, *Smith* is exempted.

Declare, The Defendant *Smith* chargeable with the amount of the monies produced by sale of the stocks, *with interest at* 4 *per cent.* from the respective times of sale, after deducting from the produce of the last sale the sum of £1764 mentioned in the report. The Master, to calculate interest at 4 *per cent.* on the

1816.

UNDERWOOD v. STEVENS.

amount, and to charge *Smith* with the same from the respective times of sale to the times when the £1764 was paid as in the Report mentioned, and from those times on the respective balances. Upon payment into the bank of what shall be found due on taking such account, *Smith* to retain such proportion of dividends on the separate estate of *Stevens*, or on the joint estate of *Stevens* and *Carttar*, as such balance shall bear to the whole debt proved under the commission (*a*).

(*a*) Reg. Lib. B. 1815, fo. 1665.

# APPENDIX.

*Liebenrood* v. *Vines*, ante, p. 15.

AFTERWARDS, *January* 26, 1816, the Plaintiff moved to dismiss his Bill, which was ordered accordingly. See Reg. Lib. 1815. B. fo. 216.

*N. B.* An obvious inaccuracy of expression occurs in the Report of this case, p. 17, where it is said, "the Injunction had been obtained *for want of* answer." Instead of which, read, "He now moved to dissolve the Injunction, which had been granted on affidavit before the coming in of the answer."

*Henwood* v. *Overend*, p. 23. See Reg. Lib. A. 1815. fo. 628.

Declare, "That neither the Defendants who are to take legacies at the death of the Testator's widow out of the £6000 laid out at interest to raise her annuity, nor those who take legacies under the codicil, were intended by the Testator to take any share of the residue of his personal estate, and of the produce of his real estate, and that the Defendant, the widow of the said Testator, cannot take any share of such residue in respect of her annuity," &c.

Referred back to the Master to tax all parties their costs, &c. and after payment, &c. ordered, That the Plaintiffs, (the Trustees named in the Will,) do pay and divide the remaining balance in

their hands among the Defendants, (the general pecuniary legatees,) in proportion to their several legacies.

*Wood* v. *Griffith*, p. 35, Reg. Lib. 1815. B. fo. 271.

On reference to the Register's Book, the case appears there as follows:—"That by decree, 22d of *March*, 1814, it was declared, that the Defendant was bound to perform his part of the award in the pleadings mentioned by joining with the Plaintiff in sale of all the estate, right, title, and interest, of the Plaintiff and Defendant in and to an estate called the *East Mark* estate; and it was therefore ordered, that the Defendant should join the Plaintiff in signing an authority to certain auctioneers to sell the estate pursuant to the award; and, in case parties should differ about the form of authority, then that it be referred to the Master to settle the same, and Plaintiff and Defendant to sign the same when so settled; and, after the sale, to execute respectively all proper conveyances of their respective rights, &c. in and to the estate to the purchaser or purchasers thereof, and to do all acts necessary to carry the same into effect.

"That by order, 23d of *May*, 1815, made by Defendant's consent, it was referred to the Master to settle and approve of a particular and conditions of sale pursuant to the decree.

"That several warrants were attended before the Master on settling the conditions of sale by the solicitors on each side.

"That the Defendant, after such proceedings, presented his petition of appeal from the said decree, praying that the cause might be re-heard.

"That by order, 18th of *August*, 1815, on Defendant's paying the usual deposit, the cause was ordered to be set down for re-hearing.

"was ordered under the particular circumstances." In the Register's Book, it stands thus:—"Ordered, That the Plaintiff do pay into Court the sum of £——," (the amount of the promissory note,) "and the injunction to be continued till hearing or further order. The Plaintiff to pay the costs of the action," &c.

*Oliver* v. *Daniel*, note, p. 500. Reg. Lib. B. 1813. fo. 1285.

The Bill was dismissed, "without prejudice to the Plaintiff's right to the £6. 10*s*. South Sea annuities in the pleadings mentioned."

Correct the short note of the judgment in this case, (p. 502,) by reading, "The Court held that the recital must be taken to *explain*," (not "to *controul*,") "the operative part of the instrument."

*Orr* v. *Chase*, (cited, p. 559.) Reg. Lib. 1812. B. fo. 1283.

This case appears, from the Register's Book, to have been as follows:—General *John Orr*, resident at *Madras*, kept a cash account with the house of *Chase*, *Sewell* and *Chase*, of the same place, merchants; and, being about to leave *Madras* for *England*, took from them a bond for 20,833 starpagodas, (the amount of the balance then due to him upon the said account,) in the form following:—"We, *Thomas Chase*, *Henry Sewell*, and *Richard Chase*, are bound to the said *John Orr* in the penal sum of," &c. "to be paid to his attorney, executors, administrators, or assigns, to which we bind ourselves, our heirs, executors, &c. and every of them *jointly* by these presents, *January* 1, 1799." The condition of the bond was that the obligors, their heirs, executors, or administrators, should pay or cause to be paid to the Plaintiff the sum aforesaid, with interest at the rate aforesaid. This bond was delivered to the Plaintiff by *Sewell* alone, and signed by him in the name of the partnership. Shortly afterwards the Plaintiff came to *England*, and was paid interest on the bond up to the 1st of *January*, 1805, together with part of the principal. On the 1st of *January*, 1800,

*Richard Chase* withdrew from the partnership, of which public notice was given in the Gazette the month preceding, as also of the admission of a new partner into the firm. Shortly afterwards *Sewell* died, and another new partner was received in his room. Of all these events the Plaintiff had express notice sent him, besides the general notice in the Gazette; and with such notice he continued to correspond with the new firms in respect of the cash balance in their hands.

The Bill was filed against *Richard Chase* and the personal representative of *Sewell*, who were both resident in *England*, (*Thomas Chase*, the other obligor in the bond, being still in *India*,) charging that the bond, though in its form a joint bond, was intended, and must be taken to be, joint and several: that he never gave up the security of the bond, nor accepted the new partnership as his debtors in discharge of the obligors therein, it being understood that those new partnerships only acted in respect thereto as agents of the old firm; that no notice was ever given to him by the obligors or either of them that they would no longer be answerable for the same; praying a declaration accordingly, and an account and payment of what remained due for principal and interest on the bond.

The Defendant, *Richard Chase*, insisted that he was a sleeping partner in the firm, and was not privy to the execution of the bond, which was joint only, and not joint and several; and that, under the circumstances of his having withdrawn from the partnership, and the Plaintiff recognizing and accepting the new firms as his debtors, he (the Defendant) was discharged from all liability, in case he was ever liable, on the said bond.

The cause came on before His Honor the Vice-Chancellor who, by decree, 21st of *July*, 1813, declared that the bond (which was signed, sealed, and delivered by *Sewell* alone in the name and as the act and deed of himself and his then partners,) must in equity be taken as the joint and several bond of the partners, and referred it to the Master to take an account of what was due for principal

and interest on the bond, to be paid by the Defendants to the Plaintiff.

To the Report made in pursuance of this decree, the Plaintiff filed an exception, which was set down to be argued; but, before the same came on for argument, the matters in dispute were compromised, and the Bill dismissed by order, dated the 11th of *July*, 1816. (Reg. Lib. 1815. B. fo. 1776.)

*Daubeny* v. *Cockburn*, p. 626. Reg. Lib. A. 1815. fo. 1666.

*Further Corrections.*

In the note to page 38, citing the case of *Walker* v. *Symonds*, read thus :—"*Roupell* moved for leave to prove *vivâ voce*, on a re-hearing before the Chancellor, exhibits which were not proved on the hearing at the Rolls."

Page 163. For "*Mills* v. *Brooks*," read "*Watts* v. *Brooks*."

Page 176. Marginal note. Read "a bankrupt *imprisoned at the time of the date of his protection* is not privileged against subsequent detainers."

Page 179. "*The Master of the Rolls.* This is a question of priority, not of *apportionment*."

Page 240. Marginal note. "On a Bill filed by *B.* for payment of the legacy, decree against the purchasers," &c.

Page 264. "*Comerford* was the equitable mortgagee of the lease, and he was in possession; and, if he had had the legal *estate*," &c.

Ib. *At the bottom.*—"The landlord sued in equity because *Comerford* was only an equitable assignee; and Lord *Thurlow* refused a decree for specific performance, on the ground that a Court of Equity does not specifically execute a *building covenant*, but decreed that *Comerford* should *turn* his equitable into a legal estate," &c.

Page 268, line 19. Dele "all."

——— line 24. Read, "their liability to be *so* sued has been strongly pressed."

Page 269. "The Plaintiff *is not to* pay the costs of the other Defendants."

Page 280, line 18. Dele "however."

Page 281. "It was considered by Lord *Somers* as *a necessary* consequence," &c.

Page 282, line 4. "Giving the *like* interest in the personal estate."

———— line 9. Dele "but without costs."

Page 296. Marginal note. Dele "*This is a conversion out and out*," and read "The real estate remaining unsold at her death goes to her personal representative."

Page 325, line 26. Dele "been."

Page 342, line 3, from the bottom. Dele "such."

Page 343, line 16. "Perhaps at the moment when he had executed the instrument."

Page 404, line 19. "And, if it were not meant that she should take it," &c.

Page 459. Marginal note. "Specific performance of an agreement *to purchase* the business of an attorney refused," &c.

Page 497, line 21. "From this decree the relators now presented a *petition* of re-hearing."

Page 570, line 18. "*Ex hypothesi*."

Page 579, at the bottom. "For the same reason, *none* of the payments that were subsequently made *could* operate in extinction of this debt."

Page 623, line 17. "It might be as well contended that, if they had thrown the bills into the fire, or lost them by negligence, Mr. *Devaynes* would be responsible for such act *or* negligence."

other trees whatsoever growing standing or being in or upon the lands and premises belonging to the Plaintiff, and in the possession tenure or occupation of the Defendant or his undertenants or undertenant or any other person for his use, and from doing or committing or causing to be done or committed any other waste spoil or destruction in or upon the said lands and premises or the buildings thereof or any part thereof in any manner howsoever, until the Defendant should fully answer the Bill, or the Court make further order to the contrary,—Now, upon motion this day made, &c. for the Defendant, it was alleged that the Defendant has since put in a full and perfect answer to the said Bill, and thereby devised the whole equity thereof, and it was therefore prayed, &c. whereupon, &c. Ordered, That the said injunction as to such part of the timber as is comprised in the agreement in the pleadings mentioned be dissolved." *Entered by Order, Feb.* 7, 1817.

*Elliot* v. *Halmarack*, p. 302. Reg Lib. A. 1815. fo. 507.

*March* 5, 1816.—"Ordered, That the Defendant, *James Halmarack*, and *Sarah*, and *Browne Halmarack*," (the wife and son of the Defendant who assisted in the assault,) "do stand committed to the *Fleet* for their said contempt, unless they, having personal notice hereof a week before, shall on *Thursday*, the 28th of *March*, shew good cause to the contrary."

*Clarke* v. *Butler*, p. 304. Reg. Lib. A. 1815. fo. 954, 956.

*Mason* v. *Mason*, p. 308. Reg. Lib. B. 1815. fo. 575.

*Bull* v. *Kingston*, p. 314. Reg. Lib. A. 1815. fo. 1733.

"*Israel Bull* and *Rebecca*, his wife, (Administratrix of Sir *William Williams*, deceased,) Plaintiffs. And
*John Kingston*, *William Ashby*, *George Talbot*, and the *Bank of England*, Defendants.

"Declare, That the Plaintiffs (in right of the Plaintiff *Rebecca*, as such Administratrix as aforesaid,) are entitled to the clear residue of the personal estate of the Testatrix, *Charlotte Williams*, including the residuary estate of *Ann Ashby*, sister of the said Testatrix.

"Bill dismissed as against the Defendants, *William Ashby* and the *Bank of England*, with costs out of the fund admitted by the Defendant *Kingston* to be due for interest and dividends on stock standing in his name as Executor to the said Testatrix."

*Careless* v. *Careless*, p. 384. Reg. Lib. A. 1815. fo. 963. By the name of *Careless* v. *Blount*.

*Woodhouse* v. *Meredith*, p. 450. Reg. Lib. B. 1815. fo. 1789.

"Declare, That the Plaintiffs *Edward Woodhouse* and *Ann Thomas* became upon the death of *Ann Woodhouse*, widow of the Testator, and are according to the true meaning and construction of his Will, entitled, for their joint lives, and the life of the survivor, to such beneficial interest as the Testator had in the leasehold messuages, lands, and hereditaments in the town of *Kensington*, in the pleadings mentioned. And that upon the respective deaths of the said Plaintiffs, the same will belong to such persons as in the Will mentioned," &c.

*Taggart* v. *Hewlett*, p. 499. Reg. Lib. B. 1815. fo. 1709.

An error of punctuation has occurred in the Report of this case. It should be thus :—" upon his paying into Court the amount of the note, and the costs of the action, which" (*i. e.* the payment of costs,)

ings mentioned (except as to that part commonly known by the name of S——), for the discovery whereof the parties are to produce, &c. and to be examined on interrogatories, &c. And in case the master do not make his report in three months, that the Defendant do within three months pay the several sums of —— (being the instalments now due and payable to the plaintiff under the said agreement) into the bank, to the credit of this cause."

*Norway* v. *Rowe*, p. 135. Reg. Lib. 1815. B. fo. 304.

*Gordon* v. *Gordon*, p. 141. Reg. Lib. 1815. A. fo. 542.

"*Adrienne Gordon*, Spinster (an infant) by *W. G.* her next friend, Plaintiff, and *James Murray Gordon*, *Alexander Gordon*, and another, Defendants.

"*Declare*, That the Plaintiff is entitled during her minority only to the annuity of £100 given by the second codicil to the child of which *Adrienne Maillet* was pregnant, for her education. That the Plaintiff is absolutely entitled to the legacy of £1,500 given her by the third codicil, and that the said annuity of £100 payable for her education during her minority is not taken away by the said legacy given by the third codicil. The master to tax all parties their costs as between solicitor and client."

*Gordon* v. *Bertram*, p. 154. Reg. Lib. 1815. A. fo. 407.

On a subsequent day (*March* 5.) "Upon affidavit by the Defendant of service of the former order, and that upon search at the Registrar's office it was found that the plaintiff had not obtained an order to revive, it was ordered that the suit should be revived."

*Acton* v. *Acton*, p. 178. Reg. Lib. 1815. A. fo. 542.

"Declare, that the legacy of £4000 given to *Isabella Acton* ought to be paid in full. Ordered, the master to whom the cause stands

referred, to compute subsequent interest on the legacy from the date of his report. So much of the £27,348 Bank annuities in trust in the cause as, at the market price of the said annuities at the day of the date of the report, should be sufficient to answer the legacy of £4000, to be carried over" to the account therein mentioned. "The master to compute subsequent interest on the legacy of £12,000, bequeathed to *Elizabeth Acton* from the date of his report; and, in case he shall find that the residue of the bank annuities and cash in the bank and balance due from the executors after payment of the interest of the £4000 and costs directed by" a former order "shall be insufficient to answer the said legacy of £12,000 and interest, then that the residue of the said bank annuities, after the carrying over before directed, be carried over in trust to an account entitled the defendant *Elizabeth Acton's* account, &c."

*Lewis* v. *Loxham*, p. 179. Reg. Lib. 1815. A. fo. 1201.

On a subsequent day a petition was presented, praying that the petitioners might be at liberty to file exceptions to the Master's Report, so far as the same had certified the necessity of the concurrence of *Susanna Gordon* to the completion of the title.

"Ordered, That it be referred back to the Master to review his Report so far as the same has certified," &c. "and do state any grounds upon which he thinks the said *Susanna Gordon*'s joining is necessary thereto." *March* 25, 1816.

*Mootham* v. *Waskett*, p. 243. Reg. Lib. 1815. fo. 272, 363.

*Allen* v. *Anthony*, p. 282. Reg. Lib. 1815. A. fo. 1806.

*March* 7, 1816.—"Whereas the Plaintiff hath obtained an injunction to restrain the Defendant, his agents workmen and servants, from cutting or felling, or causing or procuring to be cut or felled, and from taking carrying away or disposing of, all or any timber or

the residue of the testator's personal estate, having regard particularly to the two institutions named in the will. His Majesty's Attorney General and the defendants (the executors) to lay proposals before the master for that purpose. The master to enquire and state to the court, whether any and which of the next of kin of the said testator within the statutes for the distribution of intestates' estates are objects of charity within the scope of the testator's will; and, if so, such next of kin to be at liberty to lay a scheme before the master to propose themselves objects of such charity." The master to tax the costs of all parties, such costs to be paid out of the fund in court, &c.

*Wallinger* v. *Hilbert*, p. 104. Reg. Lib. B. 1815. fo. 199.

It should have been stated that His Lordship, in refusing to make the order without the consent of the party opposing the motion, intimated that, with such consent, the order might be drawn up notwithstanding, which was done accordingly.—"Referred to the Master to enquire and state to the Court whether the Plaintiff can make a good title to the premises in question, and whether the estate is discharged or exempted from payment of tithes."

The motion, which was on the part of the Plaintiff, was granted as to other objects which, having no reference to the point in question, it is not thought necessary to particularize; and the order accordingly extends to those other objects.

*Fenwick* v. *Reed*, p. 114. Reg. Lib. A. 1815. fo. 1196.

There is a slight difference in the order, as subsequently drawn up, from that which appears in the report of the case.

"*January* 17, 1816.—Ordered, that the Defendant *Sir Thomas Clavering* do produce and leave with his clerk in court all drafts and copies of drafts, and copies of deeds, letters and papers, relating to the original transactions between *Charlton* and *Reed*, or

which tend to shew that the parties continued in possession under any agreement to receive the rents and profits in discharge of the debts admitted by his answer to be in his custody or power, with liberty for Plaintiffs, their clerk in Court, solicitors or agents, to inspect the same and take copies, &c."

*Ex parte Whitehead, Re Alston*, p. 127.

The following are the minutes of the order made in the matter of this petition.

"Declared, That the sum of £2506, (being the consideration paid by the petitioner for the purchase of the annuity of £358 granted for three lives, which were still in existence at the date of the commission,) is to be considered as the value thereof at the time the same was granted, and that the same ought to be considered as diminished in value at the time of the date of the commission by reason that part of the time for which it was granted was elapsed since the grant. And, there being in this case no special circumstances, it is ordered, that the petitioner be at liberty to go before the commissioners and prove, and be admitted a creditor for, the value of the annuity at the date of the commission, such value to be estimated by them, having regard to the declaration aforesaid, and also to the time which elapsed between the last day on which the same was payable and the date of the commission; and the petitioner is also to prove the arrears of the annuity which became due up to the last day before the date of the commission on which the same was payable, and remaining unpaid at the date thereof."

*Tyrrell* v. *Rediser*, p. 132. Reg. Lib. B. 1815. fo. 347.

*Dixon* v. *Astley*, p. 133, and 378, note. Reg. Lib. A. 1815. fo. 455.

"*Ordered*, That it be referred to the master to see if a good title can be made, according to the agreement, to the estate in the plead-

"That the Plaintiff was advised that such petition of appeal was irregular, inasmuch as the same was contrary to a standing order of the Court and moreover omitted to take notice of the order by consent of the 23d of *May*, 1815, and contained allegations and matters not warranted by the pleadings; and it was, therefore, prayed that the said petition might be taken off the file for irregularity, and that the order made the 18th of *August*, for setting down the cause to be re-heard, might be discharged with costs.

"Whereupon, &c. It is ordered, that the petition of appeal be taken off the file, and the said order of the 18th of *August* is discharged; but without prejudice to the Defendant's being at liberty to file such other petition of appeal as he may be advised, after payment to the Plaintiff of the costs of the present petition, deducting the deposit, which is also ordered to be paid to the Plaintiff." *December* 21, 1815.

*Sluysken* v. *Hunter*, p. 40. Reg. Lib. 1815, B. fo. 180, by the name of *Ducos* v. *Hunter*.

*Holden* v. *Hayn*, p. 47. Reg. Lib. 1815. A. fo. 284.

Plaintiff's Bill dismissed as against the Defendant, *Robert Bacon*, without costs. Decreed, that the Defendant *John Hayn* do specifically perform the agreement in the pleadings mentioned. Referred back to the Master to compute interest on the purchase-money remaining unpaid from the 10th of *October*, 1811, to the time of the conveyance after mentioned. Ordered, that the Defendant *Hayn* do pay to the Plaintiff the sum of £2100, and execute a mortgage to the Plaintiff for the sum of £5000, payable at the time and in the manner mentioned in the agreement, and that the Plaintiff do execute a conveyance, and procure *C. D.* to join therein, &c.

*Musgrave* v. *Medex*, p. 49. Reg. Lib. 1815. B. fo. 115.

Ordered, That the Defendant *Moses Medex* do on or before the day after the first seal before the next term, pay the sum of £——

into Court; but in default thereof, that proceedings be had upon the bond given by the Defendant *Isaac Medex* and his bail, upon the writ of *Ne Exeat Regno.*

*Utten* v. *Utten*, p. 51. Reg. Lib. 1815. B. fo. 117, dated the 21st of *March* 1816.

Ordered, That *T. T.* and *W. F.* the bail for the Defendant *W. B. Utten* upon the writ of *Ne Exeat Regno*, issued in this cause, do within six months from the date of this order, pay the sum of £—— into Court. To be at liberty to apply concerning the same, and to pay the costs of this application to the Plaintiff. The sum when so paid in not to be paid out without notice.

*Burroughs* v. *Oakley*, p. 52. Reg. Lib. 1815. A. fo. 143.

"Ordered, That Defendant do on or before the 15th of *January* next, pay into Court the sum of £——, the residue of his purchase-money for the premises in question in the cause, and for the timber growing thereon, and the sum of £—— for interest thereon, at the rate of 5 *per cent.* from the 31st of *August*, 1812, the time when Defendant entered into possession of the said purchased premises."

*Pritchard* v. *Fleetwood*, p. 54. Reg. Lib. 1815. B. fo. 361.

*Mills* v. *Farmer*, p. 55. Reg. Lib. 1815. B. fo. 871.

On a subsequent application to the Court on behalf of the next of kin of the Testator, that the Master, in considering of a proper scheme, might be at liberty to inquire and state to the Court whether the next of kin were fit objects under the bequest to charitable purposes, a direction to that effect was introduced into the decree, which stands as follows:—

"Ordered, That the decree of *January* 29, 1811, so far as relates to the bequest of the residue to charitable purposes, be reversed. The Master to approve of a proper scheme for the distribution of

# INDEX

TO THE

# PRINCIPAL MATTERS.